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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., et al.,

Petitioners,

v.

UTE DISTRIBUTION CORPORATION,
a Utah corporation;
MANUEL LUJAN, Secretary of the United States
Department of the Interior,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does erroneous dictum in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), preclude Petitioners from litigating the issue of whether the Affiliated Ute Citizens (AUC) and not the Ute Distribution Corporation (UDC) is the statutorily authorized representative for the management of the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe?

LIST OF PARTIES

Petitioners are Glen Mac Murdock, Jr., Mac Eugene Murdock, and the Affiliated Ute Citizens of the State of Utah.

Respondents are the Ute Distribution Corporation, a Utah corporation, and Manuel Lujan, Secretary of the United States Department of the Interior.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Murdock v. Ute Indian Tribe of Uintah & Ouray Resv.*, 975 F.2d 683 (10th Cir. 1992), and is reproduced as Appendix A to this Petition. The district court's unreported Order is reproduced as Appendix B. The District Court's Judgment pursuant to Fed. R. Civ. P. 54(b) is reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion in this case on September 9, 1992. Petitioners' Petition For Writ of Certiorari was originally due to be filed on December 8, 1992. On November 19, 1992, Petitioners filed a motion for an Order extending the time for the filing of the Petition for Writ of Certiorari until February 8, 1993. On November 30, 1992, Justice Byron R. White of this Court entered an Order extending the time for the filing of Petitioners' Petition For Certiorari until January 7, 1993. Petitioners have timely filed this Petition before that date. Therefore, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE

25 U.S.C., § 667e, App. 23
25 U.S.C., § 667i, App. 24
25 U.S.C., § 667l, App. 26
25 U.S.C., § 667m, App. 29
25 U.S.C., § 667o, App. 30
25 U.S.C., § 667p, App. 31

STATEMENT OF THE CASE

Petitioners Glen Mac Murdock, Jr., a mixed blood Ute, his son, Eugene Mac Murdock, and the Affiliated Ute Citizens (AUC), filed the instant action seeking various

relief, including a declaratory judgment that the Affiliated Ute Citizens and not the Ute Distribution Corporation (UDC), is the mixed blood Utes' statutorily authorized representative for the management of their interests in the undivided assets of the Ute Indian Tribe pursuant to § 677i of the Ute Partition Act, 25 U.S.C., 677-677aa (hereinafter "the Act"). (App. 4-5; 24-26) The district court held that it had subject matter jurisdiction of the Petitioners' claims under the Act, pursuant to 28 U.S.C. § 1331. (App. 18)

Section 677e of Ute Partition Act permitted the mixed blood group to form an organization to represent the group for certain purposes of the Act. In 1956, in accordance with the requirements of § 677e, the mixed blood Utes created the Affiliated Ute Citizens (AUC) to act as their authorized representative. (App. 23) Thereafter, pursuant to § 677i of the Act, the AUC, as the authorized representative of the mixed blood Utes, and the Tribal Business Committee, as the authorized representative of the full blood Utes, divided "by agreement" the assets of the Ute Indian Tribe which were then capable of equitable and practicable distribution. (App. 24) The tribal assets apportioned to the mixed blood group in this division were to be held by the AUC for subsequent distribution to the individual members of the mixed blood group. The

distribution of these assets to individual mixed blood Utes was to be made pursuant to a plan for distribution to be adopted by the mixed blood Utes under § 677l of the Act. (App. 26) However, no such plan was ever adopted by the mixed blood group or by the AUC, and these assets were never distributed to the individual members of the mixed blood group.

Section 677m of the Act provided that in the event the divided tribal assets apportioned to the mixed blood group were not distributed to the individual members thereof, within seven years from August 27, 1954, that the Secretary of the Interior was authorized to make such distribution. (App. 29-30) However, the Secretary never distributed these assets to the individual mixed members of the mixed blood group.

As to the tribal assets that were not divided "by agreement" of the mixed blood and full blood groups, § 677i of the Act provided that such assets were to be administered jointly by the authorized representatives of the two groups. Section 667o of the Act provided that the undivided assets were to remain tribal property subject to the Act, any other provision of the Act notwithstanding. (App. 24, 30)

In 1958, certain individuals purporting to act on behalf of the mixed blood Utes but with no legal authority to do so, incorporated the Ute Distribution Corporation (UDC) under the laws of the State of Utah. The UDC was created for the ostensible purpose of managing the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe. Petitioners claim and will demonstrate that the creation of the UDC was not authorized by the

AUC, as the authorized representative of the mixed blood Utes, and was not established in compliance with the requirements of § 677e of the Act. (App. 23)

Following its creation, the UDC issued stock to each mixed blood Ute purporting to represent their individual interest in the undivided tribal assets of the Ute Indian Tribe. Thereafter, the Secretary of the Interior, in violation of his trust and fiduciary responsibilities to the mixed blood group, authorized and permitted mixed blood Utes to sell or transfer their interests in the undivided assets of the Ute Indian Tribe to non-members of the Tribe, in violation of the Act which restricts the right to participate in tribal assets to members of the Ute Indian Tribe. 25 U.S.C. § 677i, § 677o. (App. 24, 30)

In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144 (1972), the AUC, on its own behalf, and on behalf of the mixed blood Utes, brought suit against the United States, seeking a pro rata distribution to the individual members of the mixed blood group, of the group's interest in the mineral estate underlying the reservation, and a determination that the AUC and not the UDC is entitled to manage that property jointly with the business committee of the full blood Utes. The district court dismissed the case for lack of subject matter jurisdiction and the Court of Appeals for the Tenth Circuit affirmed. Neither court addressed the authorized representative issue.

In the meantime, 85 individual mixed blood Utes filed another action, *Reyos v. United States*, 431 F.2d 1337 (10th Cir. 1970), seeking damages against the defendant bank, certain of its officers, two automobile dealers, and

the Secretary of the Interior, for damages allegedly suffered in connection with the sale of stock issued to the mixed blood Ute plaintiffs by the UDC, due to the defendants' alleged violations of Section 10(B)(5) of the Securities Exchange Act of 1933 and the Securities Exchange Act of 1934. These violations consisted in facilitating and encouraging the sale of this stock by means prohibited under the securities laws, resulting in the sale of the UDC stock by the plaintiff mixed blood Utes for less than fair value.

On appeal, this Court consolidated the *Affiliated Ute* and *Reyos* cases for hearing because the cases arose in the same factual context. In *Affiliated Ute*, the United States erroneously represented that the AUC had created the UDC pursuant to a plan adopted by the AUC for the distribution of assets to the mixed blood Utes. In support of this argument, the United States cited resolutions passed by the AUC and certain documents which, in fact, did not refer to any plan adopted by the AUC to create the UDC. These resolutions and documents were maintained in the files of an Interior Department attorney, and the mixed blood petitioners in *Affiliated Ute* did not have access to these documents to prove that they did not relate to the creation of the UDC, as the Government contended.

After affirming the dismissal of *Affiliated Ute* for lack of subject matter jurisdiction, this Court, based upon the unsupported argument of the United States, observed in dictum that the AUC had created the UDC and had irrevocably delegated to the UDC the power to manage the interests of the mixed blood group in the undivided assets of the Ute Indian Tribe. 406 U.S. 128, 136.

In the case at bar, Petitioners presented new evidence to prove that the United States had misrepresented the facts and evidence relating to the formation of the UDC in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144 (1972). (App. 40-47) Respondents did not rebut Petitioners' new evidence in the district court or in the Court of Appeals, but argued that Petitioners were collaterally estopped from litigating the authorized representative issue. The district court so held and dismissed the UDC and the Secretary of the Interior from the suit. (App. 4) The district court later entered a final judgment as to this single issue pursuant to Fed. R. Civ. P. 54(b). (App. 5) On appeal, the Court of Appeals for the Tenth Circuit affirmed the district court's ruling. (App. 2)

In holding that Petitioners were precluded from litigating the authorized representative issue, the district court relied on the erroneous dictum in *Affiliated Ute* and several other cases incorporating this dictum. However, the district court did not rely on this Court's decision in *Reyos v. United States*, to support its decision. (App. 4, n. 3) Conversely, the Court of Appeals held that the authorized representative issue was necessarily decided in *Reyos*, and that because *Reyos* was decided with *Affiliated Ute*, Petitioners were collaterally estopped from litigating the issue the erroneous dictum in *Affiliated Ute*. (App. 10-12) The Court of Appeals failed to address Petitioners' evidence that the United States had misrepresented the facts concerning the formation of the UDC in *Affiliated Ute*, in rejecting Petitioners' contention that the authorized representative issue was not fully or fairly litigated

in *Affiliated Ute* such that Petitioners should not be collaterally estopped from litigating the issue in this action. (App. 14-16; 40-47)

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE LOWER COURTS DEPRIVE PETITIONERS OF REDRESS FOR THE VIOLATION OF THEIR FEDERAL STATUTORY RIGHTS AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, THUS MERITING THIS COURT'S REVIEW AND REVERSAL.

Based upon the erroneous dictum in *Affiliated Utes* that the AUC constituted the UDC and irrevocably delegated to the corporation the power to act as the "authorized representative" of the mixed blood Utes' interests in the undivided assets of the Ute Indian Tribe under § 677i of the Ute Partition Act, the UDC has purported to function in this capacity for approximately twenty years.

Despite the Petitioners' repeated protests to the Respondent Secretary of the Interior and the UDC, the UDC has and continues to make management decisions adverse to the mixed blood Utes' interest in undivided tribal assets of the Ute Indian Tribe, including decisions to deplete such assets, and to sell, transfer or otherwise alienate the mixed blood group's interests in such assets to individuals who are not mixed blood Utes and are expressly prohibited from sharing in tribal assets under § 677o of the Act. (App. 30)

Under Utah law, as a state corporation, the UDC can only represent the interests of its stockholders, the vast

majority of which are not mixed blood Utes. Petitioners herein own no stock in the UDC. Thus, they have no voting right or power to affect the management of their interests in indivisible tribal assets by the UDC. Accordingly, the UDC cannot legitimately function as the "authorized representative" of the mixed blood Utes to "take any action that is required by sections 677-677aa of this title to be taken by the mixed blood members *as a group*" under § 677e of the Act, in relation to the management of the mixed blood Utes' interests in undivided tribal assets pursuant to § 677i. (Emphasis supplied) (App. 23, 24-26)

The efforts of the Petitioners herein to challenge the right of the UDC to act as the authorized representative of the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe, have been wholly unsuccessful because the lower courts have felt constrained to follow this Court's erroneous dictum in *Affiliated Ute*. Since only this Court can make it possible for the mixed blood Utes to have a full and fair opportunity to litigate the authorized representative issue on the merits, by holding that the *Affiliated Ute* dictum does not preclude Petitioners from litigating the issue in this action, this Court should exercise its discretion in favor of granting the writ of certiorari requested by Petitioners.

Additionally, this Court should exercise its discretion in favor of granting the writ, because the lower courts fundamentally erred in holding that this Court's dictum in *Affiliated Ute* or this Court's decision in *Reyos*, precludes Petitioners from litigating the authorized representative issue in this action.

In affirming the trial court's decision, the Court of Appeals concedes that "had the Supreme Court decided the *Affiliated Ute* case alone, the Court's subsequent discussion of whether the AUC was the authorized representative of the mixed-blood Utes would have been unnecessary to the decision and therefore would not have precluded relitigation of that issue." (App. 10-11) Nevertheless, the Court of Appeals goes on to hold that because *Reyos* was consolidated with *Affiliated Ute* on appeal, and because this Court purportedly had to decide the authorized representative issue in *Reyos,* Petitioners are collaterally estopped from litigating this issue in the case at bar. (App. 11-12) This decision is unwarranted for several reasons.

First, the argument that Petitioners should be collaterally estopped from litigating the authorized representative issue under *Reyos,* was never made by the Respondents in the district court, formed no part of the district court's decision (App. 4, n.3), and should not have been considered by the Court of Appeals for the first time on appeal.

Second, although this Court indicated that *Reyos* and *Affiliated Ute* were consolidated on appeal because they arose out of the same factual milieu, 406 U.S. 128, 141, the court did not indicate that the authorized representative issue was an issue in each case. Indeed, this Court rendered separate findings and judgments in *Affiliated Ute* and *Reyos,* and made no findings or judgments concerning the authorized representative issue in *Reyos.* 406 U.S. 128 at 144-157.

Since the text of this Court's opinion in *Reyos* furnishes no support for the Court of Appeals' conclusion that the authorized representative issue was necessarily decided therein, the Court of Appeals must conjecture that

> In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued. . . . (App. 11),

and that in concluding that the record supported the district court's findings on damages and reinstating them,

> the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it was improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless. (App. 11-12)

The Court of Appeals fails to explain why this Court would have necessarily had to decide any of the foregoing issues in *Reyos*, given the fact, which the Court of Appeals acknowledges, that the parties never raised or litigated these issues in *Reyos*. (App. 15)

Third, contrary to the decision of the Court of Appeals (App. 7-16), none of the requirements for the application of collateral estoppel are satisfied by this Court's prior decisions in *Affiliated Ute* or *Reyos*, whether these decisions are considered separately or together.

A. Identical Issue

The authorized representative issue was never raised or litigated in *Reyos* (App. 15), as this Court's delineation

of the lower courts' findings in *Reyos* reveals. 406 U.S. 128, at 145-149. More importantly, this Court made no findings regarding the authorized representative issue in *Reyos*. 406 U.S. 128, 150-157. Since the authorized representative issue was never raised or decided in *Reyos*, it could not be an issue in common with the issues in *Affiliated Ute*, as the Court of Appeals suggests. (App. 10-12)

Although the Court of Appeals observes that the authorized representative issue is identical to that raised in *Affiliated Ute* (App. 9), the Court of Appeals concedes that the dictum concerning this issue was unnecessary to the decision in *Affiliated Ute* and therefore cannot collaterally estop Petitioners from litigating the issue in this action. (App. 10-11) Thus, the "identical issue" requirement for the application of collateral estoppel to Petitioners cannot be met based on *Affiliated Ute*, as the Court of Appeal concluded. (App. 10-12)

B. Final Adjudication On The Merits

In *Reyos*, this court held that the defendant Bank and its officers had committed violations of the securities laws by encouraging mixed blood Utes to sell their stock for less than fair value, and that the record supported the damages awarded to the plaintiff mixed blood Utes by the district court. 406 U.S. 128, at 144-157. This Court was not required to resolve the authorized representative issue because the Petitioners in *Reyos* candidly stated that their claims for relief therein did not turn on the legality of the UDC but rather on the defendant Secretary of the Interior's failure to enforce the defendants' compliance

with regulations promulgated by the Secretary concerning the sale of UDC stock. (App. 35-36)

Based upon the foregoing, Petitioners contend that the authorized representative issue was not finally adjudicated in *Reyos* such that Petitioners are not precluded from litigating the issue herein.

C. The Individual Petitioners Are Not In Privity With The Plaintiffs In *Affiliated Ute* Or *Reyos*

The Court of Appeals held that "AUC was a party to both the *Affiliate Ute* case and to the instant case and therefore is bound by the prior judgment." (App. 12) However, Petitioners contend that the only judgment to which AUC is bound in *Affiliated Ute*, is a judgment dismissing the case for lack of subject matter jurisdiction. Thus, even if the individual Petitioners herein were in privity with the AUC and thus bound to the decision in *Affiliated Ute*, such decision would not preclude Petitioners from litigating the authorized representative issue in this action.

Similarly, assuming *arguendo* that the individual Petitioners are in privity with the AUC, and that the AUC was in privity with the Petitioners in *Reyos*, as the court of Appeals found (App. 13-14), the authorized representative issue was not litigated in *Reyos* and the judgment therein does not preclude Petitioners from litigating the authorized representative issue in this action.

Alternatively, Petitioners also respectfully submit that the Court of Appeals' conclusions that the individual Petitioners herein, Glen Mac Murdock and Mac Eugene

Murdock, are in privity with the AUC (App. 12-14), are unsupported and unwarranted.

The Court of Appeals' conclusion that "Glen Mac Murdock's claims derive from the AUC for the purposes of determining whether the AUC is the . . . authorized representative" (App. 13), is unfounded. Under § 677e of the Ute Partition Act (App. 23), the mixed blood Utes were not required to create any organization to manage their interests pursuant to § 677i of the Act. (App. 24)

Pursuant to § 677e of the Act, the mixed blood Utes were given the option of managing such interests by the majority vote of individual group members. (App. 23) Thus, the interests of the mixed blood Utes, including the individual Petitioners herein, in the indivisible tribal assets would still exist and be susceptible to management by the mixed blood Utes under § 677e of the Act, even if the AUC had never been created. Therefore, petitioner Glen Mac Murdock's standing to raise the issue of which organization, the AUC or the UDC, is the statutorily authorized representative of the mixed blood Utes for purposes of § 677i of the Act, plainly does not derive from his membership in the AUC, but from his status as a member of the mixed blood group which has the right to determine what entity, if any, shall serve as its authorized representative under § 677e of the Act.

The Restatement of Judgments, § 83, comment a, provides that the ability of a party to control the representation of his interests in the prior litigation, is critical to fulfill a function of privity to provide a day in court. There was no evidence before the district court or the Court of Appeals that Mr. Murdock had any ability to

control the representation of his rights by the AUC in *Affiliated Ute* or *Reyos*, or that he had notice of such purported representation.

Petitioner Eugene Mac Murdock, the son of Petitioner Glen Mac Murdock, is not even a member of the AUC. Petitioners contend only that he is eligible to be enrolled as a mixed blood Ute and is eligible for membership in the AUC. Thus, his standing to pursue relief in this action cannot be determined in advance of a decision on the merits of these claims. Since Petitioner Eugene Murdock is not a member of the AUC, there is simply no basis for the Court of Appeals' conclusion that he had any ability to affect the litigation of the authorized representative issue in *Affiliated Ute* or *Reyos*, or that he is in privity with the AUC. (App. 13, n.6)

The Court of Appeals' speculation that Glen Murdock or Eugene Murdock might benefit directly or indirectly from a ruling that the AUC and not the UDC is the statutorily authorized representative of the mixed blood Utes, or the fact that the individual Petitioners' claims relate directly to the AUC (App. 13), do not provide legally sufficient bases for holding that these individual Petitioners are in privity with the AUC in the *Affiliated Ute* or the *Reyos* cases and the Court of Appeals fails to cite any legal authority to buttress this conclusion. (App. 13)

For the foregoing reasons, Petitioners submit that the Court of Appeals' findings that the individual Petitioners herein are in privity with the plaintiffs in *Affiliated Ute* and *Reyos* are erroneous and that the privity requirement for collateral estoppel is not met as to these Petitioners.

D. Petitioners Have Not Had A Full And Fair Opportunity To Litigate The Authorized Representative Issue On The Merits

The authorized representative issue was not fully or fairly litigated in the *Affiliated Ute* case. The issue was not raised or decided in the district court (App. 17-20), or in the Court of Appeals. In affirming the dismissal of *Affiliated Ute* for lack of subject matter jurisdiction, the Court of Appeals stated: "It is not an issue in this case as to what organization on behalf of the mixed blood group has the right of management, and we do not so decide." *Affiliated Ute Citizens of the State of Utah v. United States*, 431 F.2d 1349, at 1350 (10th Cir. 1970).

Since the authorized representative issue was never litigated in the lower courts, there was no adequate opportunity for the facts and evidence concerning the authorized representative issue to be fully developed before the issue surfaced in this Court. The fact that the parties briefed and argued this issue on appeal in *Affiliated Ute* (App. 15), cannot render this Court's discussion of the issue binding on Petitioners where the case was dismissed for lack of subject matter jurisdiction and the Government mistakenly informed the Court that the AUC had created the UDC.

Dictum in *Affiliated Ute* that, "The formation of UDC was part of the plan formulated by the mixed bloods for the distribution of assets to the individual members of their group," 408 U.S. 128, at 136, was based on incorrect representations in the Government's brief that the UDC was created by the AUC perforce of a "plan" adopted by the mixed blood Utes in a general membership meeting of

July 14, 1956, as confirmed by AUC Resolution No. 56-66. (App. 37-39)

The Government did not attach a copy of Resolution No. 56-66 to its brief in *Affiliated Utes*. (App. 39, n. 8) However, reference to documents submitted by Petitioners in the lower courts demonstrate that the "plan" referred to in Resolution 56-66 did not refer to any plan by the AUC to form the UDC. The official minutes of the general membership meeting of July 14, 1956, submitted by Petitioners as evidence in this action, confirm that the only "plan" approved by the mixed blood Utes in that meeting, was a plan for the annual 1956-57 budget of the mixed blood Utes involving a distribution of assets to individual members of the group. (App. 40-44)

Another document presented by the Petitioners in this action, the "Report On Meeting Held July 14, 1956," issued contemporaneously by the AUC Board of Directors, also indicates that the plan for the distribution of assets to the mixed blood group adopted at the July 14, 1956 meeting, related only to the 1956-1957 budget. (App. 45)

The AUC Board of Directors Resolution 56-66, dated August 13, 1956, is also mistakenly cited in the Government's brief in *Affiliated Utes* as evidence that the AUC formed the UDC (App. 46-47). In this Resolution, the AUC states that it is "approving the Proposed Plan For The Distribution Of the Assets to the Individual Members of the Mixed Blood members . . . ratified by a unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah, on July 14, 1956." Again, reference to the minutes of that meeting (App.

40-44) confirms that the only "plan" approved by the general mixed blood membership concerned the 1956-57 budget and not the creation of the UDC.

The minutes of the Special General Membership Meeting of July 14, 1956, also indicate that the AUC, as the authorized representative of the mixed blood Utes, was jointly managing the taking of fish and game on the Uintah and Ouray Indian Reservation with the Business Committee, as the authorized representative of the full blood group. These minutes are direct evidence that the mixed blood Utes had not delegated the right to manage indivisible tribal assets, including the right to hunt and fish on the Uintah and Ouray Reservation, to be managed by the UDC. (App. 41)[1]

It should also be noted that as of July 14, 1956, when the Special General Membership meeting of the mixed blood Utes was held, neither the AUC nor the mixed blood Utes as a group, could have legally created the UDC, since statutory authorization for the creation of entities "to aid in the joint management with the Ute Indian Tribe of non-distributable assets," did not even

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[1] *See, U.S. v. Felter*, 752 F.2d 1505 (10th Cir. 1985) (holding that the right to hunt and fish on the Uintah and Ouray Indian Reservation is an indivisible asset of the Ute Indian Tribe and that Ute Partition Act did not terminate the right of Mixed Blood Utes to participate in such asset.)

exist until the amendment of the Ute Partition Act on August 2, 1956, by § 677p, thereof.[2] [3] (App. 31-32)

The plan submitted to this Court in *Affiliated Ute* pursuant to which the Government alleged that AUC had created the UDC (App. 39), was not the plan adopted in the Special General Membership meeting of the mixed

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[2] In other erroneous dictum in *Affiliated Ute*, this Court states that

> In January, 1959, the AUC directors by a unanimous vote (5-0) irrevocably delegated to UDC – and indeed, to other Utah corporations of the mixed bloods, Antelope-Sheep Range Company and Rock Creek Cattle Range Company, see § 13 of the Act, 25 U.S.C. 677l(3) – to accomplish the purposes for which they were formed. 406 U.S. 128, 136.

Petitioners contend that the UDC could not have been legally formed by the AUC directors pursuant to 25 U.S.C. § 677l(3) of the Act (App. 26), because § 677l(3) only authorized the creation of corporations for the distribution of assets which had already been divided by agreement of the mixed blood and full blood groups pursuant to § 677i of the Act. The UDC did not purport to manage divided assets, but to manage the mixed blood Utes' interest in the undivided and indivisible assets of the Ute Indian Tribe.

[3] Additionally, under § 677e of the Ute Partition Act, the UDC could not be established as the "authorized representative" of the mixed blood Utes, except by a "majority vote of the adult mixed blood members of the tribe at a special election authorized and called by the Secretary of the Interior." (App. 23) In *Affiliated Ute*, this Court found that there were approximately 490 mixed blood Utes as of April 5, 1956. 406 U.S. 128, 134, n. 5. The Court's statement in *Affiliated Ute* that "By a resolution adopted by a 42-5 vote at a special meeting at which a quorum was present and voting, AUC approved the Articles of Incorporation of UDC," 406 U.S. at 136, demonstrates that the UDC was not created in conformity with the express requirements of § 677e of the Act.

blood Utes on July 14, 1956, but was a plan that was proposed during the period 1951-1954, and published in 1955, by a planning committee of one of the three Bands that comprised the Ute Indian Tribe. This plan was one of several plans proposed by the various Band planning committees, and was never adopted by the AUC, which did not even exist at the time this particular "plan" was published in 1955. 406 U.S. 128, 135.

Based upon the foregoing, it is evident that the dictum in *Affiliated Utes* that the mixed-blood Utes created the UDC pursuant to a "plan formulated by the mixed-bloods for the distribution of assets to the individual members of the group," 406 U.S. 128, at 136, was based upon inaccurate information provided to this Court by the United States. Since the dictum regarding the creation of the UDC contained in *Affiliated Ute* was not grounded in the actual facts of the case, it should not be considered as an integral part of the court's opinion, *U.S. v. Crawley,* 837 F.2d 291, 292-293 (7th Cir. 1988), or given preclusive effect with regard to the determination of the authorized representative issue in this action.

This action is not, as the Court of Appeals suggests, a case where the Petitioners are disputing that they had a full and fair opportunity to litigate the authorized representative issue in *Affiliated Ute* or *Reyos,* simply because the Court purportedly resolved the issue against them. (App. 14-16)

For many years after the *Affiliated Ute* decision, Petitioners attempted to obtain the original documents from the United States to demonstrate that the Government had misrepresented the facts and documents pertaining

to the alleged formation of the UDC by the AUC. However, Petitioners were repeatedly advised that the Government was not in possession of the documents.

Recently, documents belonging to the AUC were fortuitously observed in a Bureau of Indian Affairs Office by an AUC member. It was later learned that the documents had been recently returned to the Bureau of Indian Affairs by one of the Government's attorneys who had obtained the documents in connection with the litigation of the *Affiliated Ute* and *Reyos* cases, and had retained the documents in his office for years since that litigation. These documents, presented in the lower courts and appended to this Petition (App. 40-47), conclusively establish that the representations made to this Court in *Affiliated Ute* that the AUC created the UDC pursuant to a plan adopted in conformity with the Ute Partition Act, were and are incorrect. Thus, the authorized representative issue was not fully and fairly litigated and the requirements of collateral estoppel are not met.

Should this Court affirm the decision of the Court of Appeals, the important and substantial statutory rights of the mixed blood Utes to have a meaningful voice in the management of their interests in the undivided assets of the Ute Indian Tribe, and to preserve these assets from unlawful alienation and dissipation by the UDC without due process of law, will be reduced to a mere footnote in history. Such a result would be manifestly unjust and contrary to the intent of Congress, which sought to protect the mixed blood Utes from the alienation of their interests in the undivided tribal assets of the Ute Indian Tribe under the Ute Partition Act.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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APPENDIX

Appendix A: *Murdock v. Ute Indian Tribe of Uintah & Ouray Resv.*, 975 F.2d 683 (10th Cir. 1992) .....App. 1

Appendix B: Unreported Order of the District Court .....App. 17

Appendix C: Judgment of District Court pursuant to Fed. R. Civ. P. 54(b)....App. 21

Appendix D: United States Code Sections Cited

25 U.S.C., §677e.....App. 23

25 U.S.C., §677i .....App. 24

25 U.S.C., §677l .....App. 26

25 U.S.C., §677m.....App. 29

25 U.S.C., §677o.....App. 30

25 U.S.C., §677p.....App. 31

Appendix E: Excerpts from Brief For Petitioners, *Affiliated Ute Citizens v. United States* .....App. 33

Appendix F: Excerpts from Brief For The United States And Brief For The Securities And Exchange Commission As Amicus Curiae In *Reyos, Affiliated Ute Citizens v. United States*.....App. 37

Appendix G: Minutes of Meeting, Board of Directors of the Affiliated Ute Citizens, Unitah & Ouray Agency, Fort Duchesne, Utah, July 14, 1956 ...App. 40

Appendix H: AUC Board of Directors, Report on Meeting Held July 14, 1956.....App. 45

Appendix I: AUC Board of Directors, Resolution No. 56-66 .....App. 46

APPENDIX A

Glen Mac MURDOCK, Jr., Mac Eugene Murdock, Affiliated Ute Citizens of the State of Utah, Plaintiffs-Appellants,

v.

UTE INDIAN TRIBE OF UINTAH AND OURAY RESERVATION, a Federal corporation; Luke J. Duncan, Stewart Pike, Gary Poowegup, St., Floyd Wopsock, Alvin Pinnecoose, Curtis Cesspooch, in their official capacity as members of the Business Committee of the Uintah and Ouray Indian Reservation, Defendant,

and

UTE Distribution Corporation, a Utah corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior, Defendants-Appellees.

No. 91-4112.

United States Court of Appeals,
Tenth Circuit

Sept. 9, 1992.

Kathryn Collard (Stephen Russell, with her on the briefs), of Collard & Russell, Salt Lake City, Utah, for plaintiffs-appellants.

Stephen Roth, Asst. U.S. Atty., Salt Lake City, Utah, Robert S. Thompson, III, of Whiteing & Thompson, Boulder, Colo., and Max D. Wheeler of Snow, Christensen & Martineau, Salt Lake City, Utah (Dee V. Benson, U.S. Atty., and Camille N. Johnson of Snow, Christensen & Martineau, Salt Lake City, Utah, with them on the brief), for defendants-appellees.

Before EBEL, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and EISELE, Senior District Judge.*

EBEL, Circuit Judge.

In this appeal, we must determine whether collateral estoppel precludes the litigation of claims brought by the Affiliated Ute Citizens of the State of Utah and two individuals asserting that the Affiliated Ute Citizens of the State of Utah, and not the Ute Distribution Corp., is the authorized representative of the mixed-blood Utes for purposes of managing the mixed-blood Utes' portion of the Ute Tribe's indivisible assets. We conclude that the Supreme Court's opinion in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), precludes the appellants from relitigating this issue. Accordingly, we affirm the district court's grant of summary judgment in favor of the Ute Distribution Corp. and its co-appellee.

I. Background

Mixed-blood Utes are those members of the Ute tribe who either possess less than one-half degree of Ute Indian blood, or who possess more than one-half degree but choose to become members of the mixed-blood group. Full-blood Utes possess at least one-half degree of Ute Indian blood and do not make such a choice.[1] *See* 25

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* The Honorable Garnett Thomas Eisele, Senior Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

[1] We use the same designations that the parties use and that appear in the statute.

U.S.C. §§ 677a(b) & 677a(c). Glen Mac Murdock, Jr., one of the appellants in this case, is a mixed-blood Ute. His son, Mac Eugene Murdock, is the second appellant. The third appellant is the Affiliated Ute Citizens of the State of Utah ("AUC"), which is an unincorporated organization of mixed-blood Utes. The appellees are the Ute Distribution Corporation ("UDC"), which manages the mixed-blood Utes' mineral interests, and the United States Secretary of the Interior.[2]

The Ute Indian Tribe was divided into full-blood and mixed-blood Utes by the Ute Indian Supervision Termination Act of August 27, 1954 ("Ute Partition Act"), 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa). The Ute Partition Act partitioned tribal assets between the full-blood and the mixed-blood Utes and terminated federal supervision of mixed-blood property. The Act directed that the tribe's business committee, on behalf of the full-blood Utes, and the "authorized representatives" of the mixed-blood Utes should together divide the tribe's assets, and in the case of the mixed-blood Utes, distribute the pro-rata shares. *See* 25 U.S.C. § 677i. Certain indivisible assets, consisting primarily of mineral rights and unliquidated claims, were to be managed jointly by the business committee for the full-blood Utes and by an authorized representative of the mixed-blood Utes.

The mixed-blood Utes' "authorized representative" for purposes of the indivisible tribal assets was initially the AUC. The AUC allegedly delegated this authority to

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[2] The Ute Indian Tribe and members of its business committee were defendants below, but are not parties to this appeal.

the UDC in 1959; the AUC now disputes the validity of this delegation. The UDC issued ten shares of stock to each member of the mixed-blood group to represent his or her interest in the indivisible tribal assets. A number of mixed-blood Utes subsequently sold their shares at prices later determined to be substantially less than the stock's actual value.

For almost twenty-five years, the AUC has sought to challenge the legitimacy of the UDC's status as authorized representative of the mixed-blood Utes for purposes of managing their portion of the indivisible tribal assets. In a 1972 opinion, the Supreme Court concluded that the AUC had permanently delegated that authority to the UDC and stated, "Clearly it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144, 92 S.Ct. 1456, 1467, 31 L.Ed.2d 741 (1972).

In the instant case, the appellants filed suit seeking various relief, including a declaratory judgment that the AUC and not the UDC was the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets. The UDC and the Secretary of the Interior argued that collateral estoppel now prevents the appellants from relitigating this issue. The district court agreed[3] and dismissed the UDC and the Secretary of the Interior from the

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[3] The district court concluded that several cases in addition to the Supreme Court's decision in *Affiliated Ute* precluded relitigation of these issues. *See Maldonado v. Hodel*, No. 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g*, 683 F.Supp. 1322 (D.Utah 1988); *United States v. Felter*, 752 F.2d 1505 (10th Cir.1985); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D.Utah

suit. The court later entered final judgment as to this single claim pursuant to Fed. R.Civ.P. 54(b). This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. The Supreme Court's *Affiliated Ute* Decision

To determine whether the Supreme Court's decision in *Affiliated Ute* precludes relitigation of the issue of whether the AUC or the UDC is the authorized representative of the mixed-blood Utes for purposes of the indivisible tribal assets, we must first look to the background of that case. In *Affiliated Ute*, the Supreme Court granted certiorari in and consolidated two Tenth Circuit cases, *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (10th Cir.1970), and *Reyos v. United States*, 431 F.2d 1337 (10th Cir.1970), and decided them together. Although the AUC sponsored both cases, they involved different, albeit related, issues.

In *Reyos*, a group of mixed-blood Utes sued a bank that acted as transfer agent for the shares of UDC stock. Also named as defendants were several officers of the bank and the United States. The plaintiffs contended that

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1989), *rev'd*, 938 F.2d 1157 (10th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992); *Hackford v. First Sec. Bank*, 521 F.Supp. 541 (D.Utah 1981), *aff'd*, Fed. Sec.L.Rep. (CCH) ¶99,402 (10th Cir.), *cert. denied*, 464 U.S. 827, 104 S.Ct. 100, 78 L.Ed.2d 105 (1983). In view of our conclusion that the Supreme Court's decision in *Affiliated Ute* constitutes collateral estoppel, we do not address the preclusive effects of these other decisions.

the bank and its officers had committed securities violations in encouraging mixed-blood Utes to sell their stock. The district court agreed and granted damages based on the difference between the fair market value of the UDC shares at the time of the sales and the value received by the sellers. The Tenth Circuit reversed, finding more limited liability and remanding for a recalculation of damages.

While *Reyos* was pending, the AUC filed the *Affiliated Ute* case against the United States. In *Affiliated Ute,* the AUC sought a pro-rata distribution of the mixed-blood Utes' share of the mineral interests and a declaration that the AUC and not the UDC was the authorized representative of the mixed-blood Utes for purposes of the mineral interest. The district court concluded that it did not have subject matter jurisdiction and dismissed the suit on that basis. The Tenth Circuit affirmed.

On certiorari, the Supreme Court consolidated the two cases and heard and decided them together. The Court affirmed the Tenth Circuit in the *Affiliated Ute* case, but reversed in the *Reyos* case, essentially reinstating the district court's decision *Affiliated Ute,* 406 U.S. at 156, 92 S.Ct. at 1473. Although the Supreme Court held that the district court properly dismissed the *Affiliated Ute* case for lack of jurisdiction over the United States, it nonetheless went on to discuss the "AUC's prayer for a determination as to management rights." *Id.* at 143, 92 S.Ct. at 1467. The court stated that the AUC had properly delegated its authority to the UDC and concluded, "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144, 92 S.Ct. at 1467. In dissent, Justice Douglas argued

that the AUC had never properly delegated authority to the UDC. *Id.* at 159, 92 S.Ct. at 1475 (Douglas, J., concurring in part and dissenting in part).

III. Collateral Estoppel

Collateral estoppel, also known as issue preclusion,[4] refers "to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 376 n. 1, 105 S.Ct. 1327, 1329 n. 1, 84 L.Ed.2d 274 (1985). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980) (citation and footnote omitted); *see also Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir.1990) (quoting *Allen*).

In considering collateral estoppel, we first must determine whether to apply federal or state law. We are a federal court examining a question of federal law upon which another federal court, namely the Supreme Court, has previously ruled. Under these circumstances, we

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[4] The terms "collateral estoppel" and "issue preclusion" are used interchangeably. *See Allen v. McCurry*, 449 U.S. 90, 94 n. 5, 101 S.Ct. 411, 415 n. 5, 66 L.Ed.2d 308 (1980); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 n. 3 (10th Cir. 1990); *Koch v. City of Hutchinson*, 814 F.2d 1489, 1493 n. 1 (10th Cir.1987), *modified on other grounds*, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988).

must rely on the federal law of collateral estoppel.[5] *See Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n. 12, 91 S.Ct. 1434, 1440 n. 12, 28 L.Ed.2d 788 (1971); *Meza v. General Battery Corp.*, 908 F.2d 1262, 1265 (5th Cir.1990); *Fireman's Fund Ins. Co. v. International Market Place*, 773 F.2d 1068, 1069 (9th Cir.1985); Restatement (Second) of Judgments § 87, at 314 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court"); 18 Charles A. Wright et al., *Federal Practice & Procedure: Jurisdiction* § 4466 (1981 & Supp.1992) [hereinafter *Federal Practice & Procedure: Jurisdiction*].

In the Tenth Circuit, collateral estoppel requires that four elements be met:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

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[5] In their briefs, the parties rely predominantly on the Utah law of collateral estoppel. The requirements for collateral estoppel under Utah law appear to be substantially the same as under federal law. *Compare Berry v. Berry*, 738 P.2d 246, 248 (Utah App.1987) (requirements for collateral estoppel under Utah law) *with United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992) (requirements for collateral estoppel under Tenth Circuit law).

United States v. Rogers, 960 F.2d 1501, 1508 (10th Cir.1992) (quoting *In re Lombard*, 739 F.2d 499, 502 (10th Cir.1984)); *see also Coffey v. Dean Witter Reynolds, Inc.*, 961 F.2d 922, 925 (10th Cir.1992). To determine if collateral estoppel prevents the appellants from litigating who is the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets, we must determine if these four factors have been met.

A. *Identical Issue*

The issue the appellants are attempting to litigate is the same as the one addressed previously by the Supreme Court. In the present case, the appellants seek a declaratory judgment "that the plaintiff AUC, and not the UDC, is the authorized representative of the mixed[-]blood Utes for purposes of the 'joint management' of indivisible assets of the Ute Indian Tribe." Verified Complaint, App. to Appellant's Opening Br., Doc. 1, at 22. The Supreme Court addressed which organization, the AUC or the UDC, properly exercised management rights over mineral rights. *Affiliated Ute*, 406 U.S. at 143-44, 92 S.Ct. at 1467. The appellants do not seriously dispute that the issues are identical.

B. *Finally Adjudicated on the Merits*

We hold that the Supreme Court did reach a final decision on the merits of whether the AUC was the mixed-blood Utes' authorized representative with respect to the indivisible tribal assets. Although resolution of this issue was unnecessary to the *Affiliated Ute* portion of the

opinion, its resolution was a necessary part of the Court's decision in the *Reyos* portion of its opinion.

Adjudication on the merits requires that the adjudication be necessary to the judgment. *See Block v. Commissioners*, 99 U.S. 686, 693, 25 L.Ed. 491 (1878) ("[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which *it must necessarily have been founded.*") (emphasis added); *Insurance Co. of North America v. Norton*, 716 F.2d 1112, 1115 (7th Cir.1983) ("It is axiomatic that a party will be precluded by collateral estoppel from relying on an argument only where the determination as to the argument relied on was essential to the judgment in a prior action."); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 & n. 2 (9th Cir.1979) ("For the purpose of issue preclusion (collateral estoppel) . . . relitigation of an issue presented and decided in a prior case is not foreclosed if the decision of the issue was not necessary to the judgment. . . . "); 18 *Federal Practice & Procedure: Jurisdiction* § 4421. In particular, once a court determines that it does not have subject matter jurisdiction to consider a claim, any discussion of the merits of that claim is unnecessary to the judgment and therefore does not constitute collateral estoppel for purposes of future litigation of issues involved in that claim. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983).

In *Affiliated Ute*, the Supreme Court affirmed the Tenth Circuit's conclusion that the district court had correctly dismissed that case for lack of subject matter jurisdiction. Thus, had the Supreme Court decided the

Affiliated Ute case alone, the Court's subsequent discussion of whether the AUC was the authorized representative of the mixed-bloods Utes would have been unnecessary to the decision and therefore would not have precluded relitigation of the issue. The Court did not decide *Affiliated Ute* alone, however, but rather considered it along with *Reyos*.

In order to resolve the securities and damages claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for the Court to determine whether the UDC was the mixed-blood Utes' authorized representative. The Supreme Court concluded that the bank and two of its officers had violated the securities laws and that the district court had properly computed damages. In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued and had to determine the fair value of that stock. The district court had assessed the value of the UDC stock based on the assets held by the corporation, namely, the mineral rights, the unliquidated and unadjudicated claims against the United States, and all other indivisible tribal assets. Revenue from such assets were determined to be payable to the UDC and ultimately to be disbursed as dividends to the UDC stockholders. The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have

no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

Thus, there was a final adjudication on the merits with regard to the *Reyos* portion of the case that the rights to the indivisible assets of the mixed-blood Utes had been assigned to the UDC.

C. *Privity*

The AUC was a party to both the *Affiliate Ute* case and to the instant case and therefore is bound by the prior judgment. We must address, however, two related privity issues: (1) whether the individual appellants in the current case are in privity with the AUC and (2) whether the AUC is in privity with the plaintiffs in the *Reyos* case.

1. Privity between Murdock and the AUC

The issue of whether an association's actions bind its members is quite complex. *See Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1410 (D.C.Cir.1985). Courts sometimes hesitate to find privity between an association and its members because the interests of all members may not be similar, and thus the association may not represent the interests of all members adequately. *See generally 18 Federal Practice & Procedure: Jurisdiction* § 4456. Conversely, where the association does adequately represent the interests of all members, a court will find privity. *See, e.g., Ellentuck v. Klein*, 570 F.2d 414, 425-26 (2d Cir.1978).

In this case, it is beyond dispute that Glen Mac Murdock's claims derive from the AUC for purposes of determining whether the AUC is the mixed-blood Utes' authorized representative. For purposes of this appeal, the relief sought by the appellants, including Glen Mac Murdock, relates directly to the AUC. If the courts were to declare the AUC the mixed-blood Utes' authorized representative, the AUC could then provide benefits (in whatever form) from the indivisible tribal assets to its members. To the extent that Glen Mac Murdock would benefit if relief were obtained, he would do so only in a derivative capacity owing to his status as a member of the AUC. We therefore have no difficulty holding that privity exists between Glen Mac Murdock and the AUC.[6] *Cf. Sea-Land Services v. Gaudet*, 414 U.S. 573, 593-94, 94 S.Ct. 806, 819, 39 L.Ed.2d 9 (1974) ("[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties. In such cases, 'the beneficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship. . . . ' ") (citation and footnote omitted).

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[6] Mac Eugene Murdock is apparently not a member of the AUC. *See* Reply Br. of Appellants at 6. However, to the extent that he would not benefit from a declaratory judgment that the AUC is the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets, he has no standing to argue the issue. To the extent he would benefit from such a judgment, the same reasoning regarding privity that we apply to his father also applies to him.

To hold otherwise would lead to an untenable result. If a judgment regarding an association's status did not bind its members, then each member could relitigate the association's status until the association obtained a favorable result. This situation would undermine the very purpose of collateral estoppel.

2. Privity between the AUC and the Reyos Plaintiffs

The AUC sponsored the companioned *Reyos* case. All the plaintiffs in the *Reyos* case were members of the AUC. The AUC brought the *Affiliated Ute* case to provide an alternative remedy to the damages it viewed as inadequate in the *Reyos* case. The same attorneys represented the petitioners in both cases before the Supreme Court and filed a single brief. The AUC cannot now argue that its interests were not adequately represented during the *Reyos* litigation. Where an organization brings litigation in the name of individuals but retains "effective control", "[o]rdinary principles of preclusion by participation and control suggest that the organization should be subject to issue preclusion in later litigation." 18 *Federal Practice & Procedure: Jurisdiction* § 4456, at 492. Therefore, we hold that the AUC was in privity with the *Reyos* plaintiffs.

D. *Full and Fair Opportunity to Litigate*

The inquiry into whether a party had a full and fair opportunity to litigate an issue "[o]ften . . . will focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive

to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Sil-Flo, Inc.*, 917 F.2d at 1521 (citation omitted). After consideration of these factors, we conclude that this final requirement for collateral estoppel was met.

The AUC's initial complaint in the *Affiliated Ute* case sought a determination of its status as the mixed-blood Utes' authorized representative "to exercise management privileges for its members with respect to their unadjudicated legal claims and the mineral estate." *See* Br. for Petitioners at 5, in App. to Joint Br. for Appellees UDC and United States, Tab 1. Because the district court dismissed that case for lack of subject matter jurisdiction, both the district court and the Tenth Circuit failed to reach this issue. Although the AUC did not raise the authorized representative issue in the *Reyos* case, the Supreme Court indicated its view that common issues arose in the *Reyos* and *Affiliated Ute* cases when it consolidated them. The AUC proceeded to brief the issue in its consolidated briefs and asked the Supreme Court to decide the issue. *See id.* at 6-7, 13, 41-44, 54-55; Reply Br. for Petitioners at 22-31, 36-37, 41, in App. to Joint Br. for Appellees UDC and United States, Tab 3.

Under these circumstances, the AUC cannot now complain that it did not have a full and fair opportunity to litigate the issue. It raised the issue in its initial complaint in one of the cases. It asked the Supreme Court to decide the issue in its brief, and it argued its position extensively. The Supreme Court did decide the issue. In fact, the AUC does not object to the Supreme Court's addressing the issue; rather, it objects only to the fact that the Supreme Court resolved the issue against it. An

adverse judgment does not reflect, however, on a party's opportunity to litigate an issue. Indeed, but for a prior adverse judgment, a party would not need to argue against collateral estoppel. We hold that the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets.

IV. Conclusion

The Supreme Court's decision in *Affiliated Ute Citizens v. United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity "entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." 406 U.S. at 144, 92 S.Ct. at 1467. Thus, the doctrine of collateral estoppel precludes the appellants here from relitigating that issue. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

GLEN MAC MURDOCK, JR., MAC EUGENE MURDOCK and the AFFILIATED UTE CITIZENS OF THE STATE OF UTAH,

Plaintiffs,

vs.

UTE INDIAN TRIBE OF UINTAH & OURAY RESERVATION, a federal corporation; LUKE J. DUNCAN, STEWART PIKE, GARY POOWEGUP, SR., FLOWYD WOPSOCK, ALVIN PINNECOOSE, and CURTIS CESSPOOCK, in their official capacity as members of the BUSINESS COMMITTEE of the Uintah & Ouray Reservation, UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUEL LUJAN, JR., Secretary of the United States Department of Interior,

Defendants.

ORDER

Civil No. 89-C-982G

On February 2, 1990, the above entitled case came on for hearing on various motions, including defendant Ute Distribution Corporation's ("UDC") Motion to Dismiss or Alternatively for Partial Summary Judgment, which

motion was fully argued. After hearing argument by counsel, the court deferred ruling on UDC's motion and deferred fully hearing the other motions pending resolution of common issues in a case before the Honorable Chief Judge Bruce S. Jenkins, case number 85-C-569J, and in a case before the Honorable Judge David K. Winder, case number 89-C-959W. Following two en banc hearings regarding issues common to the three cases, on August 31, 1990, the en banc court made Findings of Fact, Conclusions of Law and entered a preliminary injunction addressing the rights of mixed-blood Indians to hunt and fish on tribal lands. The en banc court found, *inter alia*, that it has subject matter jurisdiction over matters concerning rights which are the subject of the 1954 Ute Termination Act, ch. 1009, 68 Stat. 868, codified at 25 U.S.C. §§ 677 ("Termination Act"), and that it has subject matter jurisdiction over matters concerning the interpretation and enforcement of provisions and the consequences of the Termination Act. The Tribe has appealed the August 31, 1990 preliminary injunction decision of the en banc court.

On October 10, 1990, a conference was conducted by this court to determine the status of the instant case in light of the proceedings and conclusions of the en banc court. At that time, the court ORDERED that the Motion to Dismiss filed by defendant Ute Indian Tribe on the basis of Sovereign Immunity was STAYED pending the resolution of its appeal of the preliminary injunction entered by the en banc court. The court further ORDERED that the Motion to Intervene filed by attorney Kent Higgins on behalf of several mixed-bloods was also STAYED pending the Tribe's appeal. Also pending in this

case is the Motion to Dismiss filed by defendant Manuel Lujan, Jr., Secretary of the United States Department of Interior. The court took under advisement defendant UDC's Motion to Dismiss, which all parties agreed previously had been fully briefed and argued. Now, being fully advised, the court enters this Order.

After having reviewed the briefs and the entire file of this case, and having heard extensive argument by counsel at the hearing of February 2, 1990, it is hereby

ORDERED, that defendant UDC's Motion to Dismiss is GRANTED. The court concludes that the numerous decisions by this court and others collaterally estops plaintiffs' claims for declaratory relief that Affiliated Ute Citizens ("AUC"), and not UDC, is the authorized representative of the mixed-blood Utes for purposes of joint management of indivisible assets of the Ute Indian Tribe pursuant to the Ute Partition Act. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 139-44 (1972); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981).

IT IS FURTHER ORDERED, that Defendant Lujan's Motion to Dismiss is GRANTED in light of the foregoing order. The Plaintiffs' Complaint alleges that Secretary of Interior Lujan has failed to recognize the representative authority claimed by plaintiff AUC. The court's order, *supra*, dismissing plaintiff's claims that AUC is the authorized representative of the mixed-blood Utes renders

plaintiffs' claims against defendant Lujan to be without support.

Counsel for defendant UDC and for defendant Lujan are directed to prepare a form of Judgment consistent with this Order and lodge the same with the court after compliance with local rule 13(e).

IT IS SO ORDERED.

DATED: OCTOBER 19, 1990.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

KATHRYN COLLARD, #0697
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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GLEN MAC MURDOCK, JR., MAC EUGENE MURDOCK and the AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, Plaintiffs, v. UTE INDIAN TRIBE OF UINTAH AND OURAY RESERVATION, a federal corporation; LUKE J. DUNCAN STEWART PIKE, GARY POOWEGUP, SR., FLOYD WOPSOCK, ALVIN PINNECOOSE, and CURTIS CESSPOOCH, in their official capacity as members of the BUSINESS COMMITTEE of the Uintah and Ouray Indian Reservation, UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUEL LUJAN, JR., Secretary of the United States Department of the Interior, Defendants.	**ORDER GRANTING RULE 54(b) CERTIFICATION OF FINAL JUDGMENTS** CIVIL NO. 89-C-982-G

BASED upon Plaintiffs' Motion For Rule 54(b) Certification Of Judgments dated May 7, 1991 and the Stipulation To Plaintiffs' Motion For Rule 54(b) Certification Of Judgments, dated May 13 and 14, 1991, and good cause appearing, therefore IT IS HEREBBY ORDERED:

1. That pursuant to Rule 54(b), Federal Rules of Civil Procedure, this Court hereby directs the entry of final judgments on motions to dismiss, for defendant Ute Distribution Corporation and defendant Manuel LuJan, Jr., as to plaintiffs' claim for declaratory judgment that plaintiff Affiliated Ute Citizens, and not the Ute Distribution Corporation, is the authorized representative of the Mixed Blood Utes for purposes of the joint management of indivisible assets of the Ute Indian Tribe pursuant to the Ute Partition Act, more particularly set forth in the Judgment dated December 17, 1990, granting defendant Ute Distribution Corporation's motion to dismiss this claim, and Judgment dated December 19, 1990, granting defendant Lujan's motion to dismiss this claim.

DATED this 17 day of June, 1991.

BY THE COURT:

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

§ 677e. Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by this subchapter to be taken by the mixed-blood members as a group: *Provided,* That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of this subchapter.

(Aug. 27, 1954, c. 1009, § 6, 68 Stat. 868.)

§ 677i. Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon nonagreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions

The tribal business committee representing the full-blood group, and the authorized representative of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided herein. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups. Such partition shall give rise to no cause

of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and[1] unadjudicated or unliquidated claims against the United States, all gas,

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[1] So in original. Probably should be "of".

oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law.

(Aug. 27, 1954, c. 1009, § 10, 68 Stat. 873; Sept. 25, 1962, Pub.L. 87-698, 76 Stat. 597.)

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§ 677l. Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratified by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover –

(i) the proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of this subchapter, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by this subchapter, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such

improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or

other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group; after deducting reasonable cost of sale and distribution.

(Aug. 27, 1954, c. 1009, § 13, 68 Stat. 874.)

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§ 677m. Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954

In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954,

distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677*l* of this title, so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common. Aug. 27, 1954, c. 1009, § 14, 68 Stat. 875.

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§ 677o. Termination of restrictions on individually owned property of the mixed-blood group

(a) Transfer of control of trust property; removal of sales restrictions

When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of

such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of this subchapter, notwithstanding anything contained herein to the contrary.

(Aug. 27, 1954, c. 1009, § 16, 68 Stat. 875.)

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§ 677p. Tax exemption; exceptions and time limits; valuation for income tax on gains or losses

No distribution of the assets made under the provisions of sections 677-677aa of this title shall be subject to any Federal or State income tax: *Provided,* That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided,* That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall

not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of sections 677-677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. Aug. 27, 1954, c. 1009, § 17, 68 Stat. 876; Aug. 2, 1956, c. 880, § 3, 70 Stat. 936.

APPENDIX E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-V.-

UNITED STATES, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The orders of the United States District Court for the district of Utah entering judgment for plaintiffs in *Reyos v. First Security Bank* (Reyos herein), and dismissing *Affiliated Ute Citizens of the State of Utah v. United States* (*AUC* herein) on the merits and for lack of jurisdiction, are unreported (A.[1] 573

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[1] "App." refers to the Appendix of pertinent Statutes and Regulations appearing at the back of this brief. "A" refers to the separately bound Appendix of proceedings herein. "E" refers to the Exhibit volume of the Appendix. "R" refers to the Record.

QUESTIONS PRESENTED

1. Whether bankers who contract to enforce the Indian laws and regulations applying to an Indian corporation, by acting as its transfer agent, depository for the individual Indian's stock, and agent for the conduct of the business of the corporation, violate Rule 10b-5:

(a) When they secretly act simultaneously as market makers for the stock, or as agents for or in aid of non-Indian purchasers?

(b) When they cause stock transfers to be made in a manner other than as specified in the Indian laws and regulations?

(c) When they withhold information designed to discourage the Indian from selling his stock?

(d) When they alter or misrepresent documents filed with government officials primarily responsible for supervising the sale of Indian property?

2. Does the reference to conduct "in connection with the purchase or sale of any security" in Rule 10b-5 mean that the defendant must be acting in his own interest, as a purchaser or seller, for a profit?

3. Under an Indian termination act, declaring a phased withdrawal of Government services rendered to Indians and an end to supervision of their restricted property:

(a) Are the Indians deprived, by implication, of any interest in their property, or do they lose their cultural identity as American Indians so that benefits of law other than under Federal statutes are eliminated by implication?

(b) Is BIA's administrative modification or acquiescence in the modification of termination procedures prescribed by Congress, so that protections to Indians and their property are eliminated or reduced, actionable negligence?

(c) Does publication of a "termination proclamation" eliminate the Government's duty to Indians with respect to limited supervisory functions Congress directed be performed after publication, or as to property over which the Government retains limited supervisory control?

4. The subsidiary question in *AUC* of whether the United States District Court has jurisdiction to determine an Indian's rights in property, including management rights, purportedly granted under a termination act?

5. The subsidiary question in *Reyos* of what relief is appropriate to the individual Indian?

* * *

D. *The UDC Stock Sales.*

The substitution of a corporate charter for the constitution and bylaws prescribed by the Termination Act injected a new element into Congress' termination program – corporate stock is subject to sale, but membership in the unincorporated association, like a person's citizenship, is not. Apart from the question of the propriety of the formation of UDC, however, the sales of UDC stock to non-Indians were accomplished in a manner which deviated from the regulations adopted by the Secretary. That is, whether the Secretary had authority to do so or not, he did form UDC and promulgate regulations concerning it,

and if he had required strict compliance with those regulations the improper sales could not have occurred. The *Reyos* plaintiffs claim the action of BIA in permitting the deviation was negligent and that the course of business employed by the Bank's officers pursuant to the deviations amounts to fraud.

* * *

APPENDIX F

No. 70-78

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.,

ANITA REYOS, ET AL., PETITIONERS

v.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, ET AL.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND BRIEF FOR THE SECURITIES AND EXCHANGES COMMISSION AS AMICUS CURIAE IN *REYOS*

ERWIN N. GRISWOLD
Solicitor General

SHIRO KASHIWA
Assistant Attorney General

A. RAYMOND RANDOLPH, JR.
Assistant to the Solicitor General

EDMUND B. CLARK
Attorney, Department of Justice
Washington, D. C. 20550

G. BRADFORD COOK
General Counsel

WALTER P. NORTH
Associate General Counsel

THEODORE SONDE,
Assistant General Counsel

RICHARD S. SELTZER
Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

* * *

The Ute Distribution Corporation was formed in 1958 for the purpose of managing "jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe * * * all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution to which the mixed-blood members of the said tribe * * * may become entitled * * * and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation * * * " (Ex. App. 3-4). Formation of a corporation and issuance of stock for these purposes constituted part of the plan

formulated by the mixed-bloods for distributing assets to the individual members of their group (Ex. App. 141).[8]

* * *

[8] Resolution No. 56-66 of Affiliated Ute Citizens states that the "plan was ratified by unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah on July 14, 1956." This Resolution is not contained in the record in these cases but is part of the record in *Affiliated Ute Citizens, et al. v. United States*, No. 156-69, Court of Claims, where it is included as Affidavit No. 3, Item 9, in support of the government's motion for summary judgment, which is currently pending. (The same counsel represents petitioners here and plaintiffs in the Court of Claims case.)

APPENDIX G

MINUTES OF MEETING
BOARD OF DIRECTORS OF THE
AFFILIATED UTE CITIZENS
UINTAH & OURAY AGENCY,
FORT DUCHESNE, UTAH
JULY 14, 1956

The meeting of the Special General Membership meeting of the Affiliated Ute Citizens of the State of Utah was called yo [sic] order by the President of the Board of Directors, Lula H. Murdock with 54 eligible voters present.

The first item of business was the introduction of the Board of Directors and the Superintendent, Mr. John O. Crow.

After the introductions the first matter of business was the proposed Budget for the Fiscal Year 1957. Superintendent Crow had been asked by the Board of Directors to read the Budget as was proposed and explain the same to the group. Connie Mack Denver objected to Mr. Crow reading the budget on the grounds that he felt it was a matter of our own business and that the Board of Directors should present it themselves.

Mr. Crow divided the Budgetbinto [sic] two sections, the money that would be used on joint operations with the Full-Bloods and the funds that would be used by the Mixed-Bloods separately. The Budget consisted of 20 Sections as follows:

Section 1.	Prosecution of Claims.....	$ 27,000.00
Section 2.	Legal Counsel	2,575.00
Section 3.	Budget & Finance.....	2,705.00

Section 4.	Fish & Game	3,659.00
Section 5.	Range Management	2,416.00
Section 6.	Credit	1,673.75
Section 7.	Public Law 671 Expenses..	2,504.00
Section 8.	Inventory Cost.....	1,000.00
Section 9.	Audit Expense.....	1,000.00
Section 10.	Automatic Raises .....,	500.00
Section 11.	Office Expense.....	600.00
Section 12.	Office Supplies.....	400.00
Section 13.	Telephone & Telegraph....	350.00
Section 14.	Travel	2,000.00
Section 15.	Board of Director Meetings	18,200.00
Section 16.	Equipment.....	1,000.00
Section 17.	General Fund.....	5,000.00
Section 18.	Per Capita Payment ($4500)	2,205,000.00
Section 19.	Per Capita Payment ($500.00).....	245,000.00
Section 20.	Per Capita Payment ($500.00).....	245,000.00
	Total.....	$2,767,582.75

The first ten sections of the Budget are the items that will be managed jointly with the Full-Blood Group. After a discussion on several items in the budget a motion was made by Thelma C. Forg to approve the Proposes [sic] Budget as presented, this was seconded and the motion carried.

The next item of business on the agenda was the Supplement to the Plan for the Division of the Assets to Members of the Mixed-Blood Group which pertains to how our Law & Order problem will be handled. Dudley Burson made a motion that we approve the Supplement to the Plan, this was seconded and the motion carried.

The next item was to change the Constitution and By-Laws, have an amendment made to state a Special General Membership Meeting could be called in 15 days instead of 30 days as sometimes there is great need for an immediate meeting. This was agreed upon and David Harris Workman made the motion and it was seconded and carried.

The next item on the agendaawas [sic] what we intended to do in regards to our Attorney. Whether or not the group was in favor of rehiring Mr. John S. Boyden to continue to act in our behalf.

Sarah Hackford stated that she was not campaigning for Boyden but she felt that the group should rehire him as he was well acquainted with our affairs and could go on without any study.

Arthur Workman stated that he was not in favor of Boyden as he had been rehired by the Full-Blood Group and that he could not represent both the Full-Blood Group and the Mixed-Blood Group. He suggested that possibly the Board of Directors could contact other Lawyers and see what they would work for and then report back to the group.

Margaret Phillipps stated that she understood that Mr. Boyden could not legally represent the two groups and that he could be disbarred if he attempted to do so.

Irma Sutteer stated that she felt that alot of the people that were opposing the hiring of Mr. Boyden were doing so from a personal grudge standpoint, and that they were overlooking the fact that he had done alot of good for the Tribe.

Stacey Reed stated that he felt that Mr. Boyden had too many iorns [sic] in the fire now that he was campaigning for the Governor of the State and that he could not do us justice if he was successful in this campaign.

Lillial Young made the motion that it be put to a vote to see how many were in favor of hiring Mr. Boyden.

Della Curry stated if Mr. Boyden could work for the Full-Bloods where were we any different that he was a good man and had many good things for the tribe.

After a lengthy discussion on the suggestion that we have several attorneys attend the next meeting and have Mr. Boyden here to talk to the group. Mrs. Young with drew her motion and the discussion continued.

Mary Harris stated that we would be doing a great wrong if we put Boyden out now as he was a good man. That the best thing for the group to do was to hire him again.

Earl Gardner made the motion that we hire Mr. John S. Boyden for another year the motion was seconded and the vote was by raising of hand and the vote was counted as 36 members for the hiring of Mr. Boyden and 12 against.

Arthur Workman stated to let the ones that wanted him pay for his salary but President Murdock stated that the majority rules and that was what we would be governed by what the majority wants.

Motion was made by Connie Mack Denver that the Board of Directors ask for the $4500 per capita payment on the following Monday. Motion was seconded and carried.

The report of the business done by the Board of Directors was read by the Secretary. David Harris Wrokman [sic] made a motion that hereafter the report be read at the beginning of the meeting. Motion was seconded and carried.

There being no further business at this time Elizabeth Bumgarner made a motion to ajourn and it was seconded by Elmer Hackford. Motion was carried and the meeting ajourned.

APPROVED:

_____ _____

Elizabeth Bumgarner, Secretary
Board of Directors of the
Affiliated Ute
Citizens of the State of Utah.

APPENDIX H

REPORT ON MEETING HELD JULY 14, 1956

For your information we are sending the following report on the Special General Membership Meeting held at Fort Duchesne, on the 14th day of July, 1956

1. Enclosed itimized budget for the fiscal year 1957 was approved unamimously by the membership.

2. Plan for the Distribution of the Assets to the Individual Mixed-Blood members was ratified with one amendment, to include the two $500 per capita payments that are proposed for payment in December and March. The Supplement to the Plan was also approved in regards to our paying a share of the cost of the Law & Order.

3. Amendment was approved to be made to the Constitution and By-Laws, allowing us to call a Special General Membership Meeting in fifteen days instead of thirty days,

4. John S. Boydon was employed for another year as our attorney and General Legal Counsel.

The Board of Directors

APPENDIX I

PC. 56-66

Uintah and Ouray Agency
Fort Duchasne, Utah

August 13, 1956

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH THAT: We hereby approve the Proposed Plan for the Distribution of the Assets to the Individual Members of the Mixed-Blood Members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah. Said plan was ratified by unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah on July 14, 1956.

Be It Further Resolved that we hereby approve the Supplement to the Plan for the Distribution of the Assets to the Individual Members of the Ute Indian Tribe, with regards to the Law & Order for said Mixed-Blood Group.

/s/ Lula H. Murdock
Lula H. Murdock,
President

/s/ Preston Allen
Preston Allen,
VicePresident

/s/ Elmer Hackford
Elmer Hackford,
Member

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Member

/s/ Henry Wopsock
Henry Wopsock,
Member

CERTIFICATION

I hereby certify that the above resolution was adopted by the Board of Directors of the Affiliated Ute Citizens of the State of Utah at a Special meeting held at Fort Duchesne, Utah on the 13th day of August, 1956, by a vote of 5 for and 0 against.

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Secretary
Board of Directors

Supreme Court, U.S.
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No. 92-1149

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., ET AL.,

Petitioners,

v.

UTE DISTRIBUTION CORPORATION; a Utah Corporation; BRUCE E. BABBITT, Secretary of the United States Department of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR UTE DISTRIBUTION CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of this Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), that respondent Ute Distribution Corporation ("UDC"), and not petitioner Affiliated Ute Citizens ("AUC"), is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, collaterally estops the claims of AUC (and claims of the individual petitioners), that AUC, and not UDC is the authorized representative of the mixed-bloods.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683 (10th Cir. 1992), and is reproduced at Petitioners' Appendix A. The unreported Order of the United States District Court for the District of Utah is reproduced at Petitioners' Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on September 9, 1992. On November 30, 1992, Justice Byron R. White entered an Order extending the time for the filing of Petitioners' Petition for a Writ of Certiorari until January 7, 1993. The Petition was timely filed. On February 1, 1993, this Court extended the time for filing the UDC's Brief in Opposition to Petition for a Writ of Certiorari, to and including March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ute Partition Act of August 27, 1954, ch. 1009, 68 Stat. 868, codified and amended at 25 U.S.C. §§ 677-677aa. The relevant portions of the Ute Partition Act are reproduced at Petitioners' Appendix D.

STATEMENT OF THE CASE

Petitioners AUC, Glen Mac Murdock, Jr. (a member of AUC who is enrolled as a mixed-blood Ute Indian), and his son, Mac Eugene Murdock filed the instant action seeking declaratory relief, including a declaratory judgment that AUC rather than UDC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Indian Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, pursuant to Section 677i of the Ute Partition Act.

The Ute Partition Act was enacted by Congress in 1954 and divided the Ute Indian Tribe into two groups, mixed-blood members and full-blood members, for purposes of partitioning and distributing tribal assets and terminating federal supervision over the property of the mixed-blood members.

Section 10 of the Ute Partition Act, 25 U.S.C. § 677i, states that when the final membership rolls of the mixed-blood and full-blood groups had been published, the Tribal Business Committee, representing the full-bloods, and the authorized representatives of the mixed-bloods were to commence division of the assets of the tribe that were then susceptible to equitable and practicable distribution. (Petitioners' Appendix D "Pet. App." at 24-26).

The Ute Partition Act also provides that:

> All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law. . . .

25 U.S.C. § 677i. (Pet. App. D at 25).

The Ute Partition Act authorized the mixed-blood members of the tribe to organize in order to adopt bylaws and a constitution, and to provide by that constitution for "[t]he selection of authorized representatives who shall have power to take any action that is required by [the Act] to be taken by the mixed-blood members as a group." 25 U.S.C. § 677e. (Pet. App. D at 23). Appellant

AUC, an unincorporated association, was formed in 1956 and was the product of this organizational power. *Affiliated Ute*, 406 U.S. at 135.

The Constitution of AUC authorized its board of directors to "irrevocably delegate to corporations, . . . to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe . . . such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized." Constitution of the Affiliated Ute Citizens of the State of Utah, Article V, §§ 1(B), excerpts of which are reproduced as Appendix A to this Brief, at 4-5.

UDC was created by AUC and incorporated in 1958 with the stated purpose to "manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation as herein provided." Articles of Incorporation of Ute Distribution Corporation, Article IV *Purpose*, excerpts of which are reproduced as Appendix B to this Brief, at 8-9.

The Articles of Incorporation of UDC further state that in exchange for said stock, the stockholders of UDC, the mixed-bloods, delegate to UDC and the officers

thereof authority to manage jointly with the Tribal Business Committee of the full-blood group all assets not susceptible to equitable and practicable distribution. Articles of Incorporation of Ute Distribution Corporation, Article VI, *Stock*. (App. B at 9-11).

Pursuant to the authority to delegate the power to manage assets of the mixed-blood members of the Ute Tribe, the Board of Directors of AUC, by resolution dated January 7, 1959, irrevocably delegated to UDC the authority to accomplish the purpose for which it was formed, that is, to manage jointly with the Tribal Business Committee all "assets not susceptible to equitable and practicable distribution." The AUC corporate resolution is reproduced as Appendix C to this Brief.

As part of the distribution plan each mixed-blood received ten shares of UDC stock, entitling the holder to vote for mixed-blood delegates, and to share in the distribution of proceeds from the jointly managed assets. However, stock of the corporation is "subject to transfer, devise or dissent. If a mixed-blood member . . . or any stockholder [] disposes of his stock, he will no longer have a vote or any control in the affairs of the corporation, or be entitled to share in the distribution of the proceeds. . . . " Articles of Incorporation of Ute Distribution Corporation, Article VI, *Stock*. (App. B at 10-11).

A number of mixed-bloods subsequently sold their stock in UDC. This gave rise to the *Reyos* litigation, which was subsequently consolidated with the *AUC* case in

Affiliated Ute, 406 U.S. 128 (1972).[1] *Reyos* was a suit by 85 mixed-bloods against a bank and two of its officers alleging violations of the Securities Exchange Act of 1934 and SEC Rule 10b-5 in connection with disadvantageous sales by the plaintiffs of their shares in UDC. The United States was added as a defendant, the plaintiffs alleging that it had breached its trust relationship with them by failing to oversee their improvident sales of the UDC stock and failing to prevent fraud in connection with those sales. The district court entered judgment in favor of plaintiffs.

The *Reyos* plaintiffs appealed the district court's decision on the grounds that the court had miscalculated damages on the stocks' market value at the time of sale, rather than on the value of the underlying mineral estate. *Id.* at 140-141. The Tenth Circuit Court of Appeals reversed, limited liability and remanded for a recalculation of damages. *Reyos v. United States*, 432 F.2d 1337 (10th Cir. 1970).

On appeal to this Court, plaintiffs and AUC claimed that, as the remedy in *Reyos* the beneficial interest in the underlying mineral estate should have been vested in the undivided mixed-blood plaintiffs, i.e., that they should have been entitled to receive future royalties and other benefits from the mineral estate based on a pro rata share. *Affiliated Ute*, Brief for Petitioners, portions of which are reproduced as Appendix D to this Brief, at 19-23.

---

[1] The *Affiliated Ute* case was the resolution of the appeals of two consolidated cases, referred to by this Court, respectively, as the *Reyos* case and the *AUC* case. *Affiliated Ute*, 406 U.S. at 132, 139-141.

After the district court's decision in *Reyos*, but before entry of the final judgment in that case, AUC filed the *AUC* case against the United States, claiming: (1) that its individual members (including the *Reyos* plaintiffs) were entitled to a pro rata distribution of the mineral estate underlying the reservation, on the theory that UDC had been invalidly created and that it should be abolished and its ownership of the mixed-bloods' mineral rights terminated; and (2) that AUC, and not UDC should be declared the authorized representative of the mixed-bloods for management of the mineral estate jointly with the tribal business committee. *Affiliated Ute*, 406 U.S. at 139-40; (App. D at 17-18).

The *AUC* case was filed by the AUC (the membership of which included the *Reyos* plaintiffs), to facilitate a flexible damage theory and to allow the judge to grant the full relief to which the *Reyos* plaintiffs thought they were entitled, i.e., relief not tied to the market value of the UDC stock. That relief was the abolition of the intermediary UDC, with the result that the AUC membership (all 490 mixed-blood Utes) would be entitled, not just to the damages from the sale of stock, but to direct pro rata ownership of the mineral estate and payment of all royalties and other proceeds of that estate from the inception of termination of their tribal status into the future.[2]

---

[2] AUC noted in the Brief of Petitioners that, as the authorized representative it, and not UDC,

> represents the persons entitled to the cash proceeds of the minerals. If UDC is the authorized representative, the non-Indian purchasers of the UDC stock [from the plaintiffs] are entitled to those payments. If AUC is the proper authorized representative, those who are entitled are its Indian members.

Affiliated Ute, Brief of Petitioners. (App. D at 20).

The United States filed a motion to dismiss the *AUC* case on the basis of subject matter jurisdiction and for failure to state a claim. The district court granted the motion on the grounds that the suit was an uncontested suit against the United States over which it did not have subject matter jurisdiction. The Tenth Circuit Court of Appeals affirmed. *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (1970).

On certiorari, this Court consolidated the *Reyos* and *AUC* appeals noting that the "two cases although different, have their roots in the formation of UDC." *Affiliated Ute*, 406 U.S. at 141. This Court recognized the interdependence of *AUC* and *Reyos*. This Court affirmed the Tenth Circuit Court of Appeals in the *AUC* case, and the judgment of the Court of Appeals in the *Reyos* case insofar as it concerned the United States; insofar as it concerned the bank and its officers, this Court affirmed in part and reversed in part, reinstating the district court's decision on the measure of damages.

Although this Court held that the lower courts had properly dismissed the *AUC* case for want of jurisdiction, this Court acknowledged AUC's prayer for "a determination that AUC and not UDC is entitled to manage that property jointly with the business committee of the full-bloods." *Affiliated Ute*, 406 U.S. at 139, 143. This Court reviewed the formation of AUC and UDC and concluded that "UDC's formation and structure were contemplated by the [Ute Partition] Act, and AUC itself created and breathed life and vigor into UDC." *Id.* at 144. This Court declared: "Clearly, it is UDC and not AUC that is entitled

to manage the oil, gas, and mineral rights with the committee of the full bloods." *Id.* This Court's decision concerning damages in the *Reyos* case was based expressly on the premise that UDC was the authorized representative of the mixed-bloods, and that the mixed-bloods' interest in the oil, gas and mineral rights on the reservation was represented by UDC stock.

The United States District Court for the District of Utah has repeatedly recognized UDC as the authorized representative of the mixed-blood Utes for purposes of managing with the tribal business committee those assets not susceptible to equitable and practicable distribution. *See Ute Distribution Corp. v. United States*, 721 F.Supp. 1202, 1204, n. 6 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g*, 683 F.Supp. 1322, 1324 (D. Utah 1988); *Hackford v. First Security Bank*, 521 F.Supp. 541, 558 (D. Utah 1981); *Affiliated Ute Citizens v. Ute Indian Tribe*, No. 85-C-0569J (D. Utah February 3, 1987).

Petitioners filed the present action seeking, among other relief, a declaratory judgment that AUC rather than UDC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the tribal business committee all indivisible tribal assets. The UDC and Secretary of the Interior filed motions to dismiss on the grounds that collateral estoppel prevents petitioners from relitigating the authorized representative issue. The district court granted the motions on those grounds.

The Tenth Circuit Court of Appeals affirmed on appeal and held that:

> The Supreme Court's decision in *Affiliated Ute Citizens v. United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity "entitled to manage the oil, gas, and mineral rights with the committee of the full bloods." 406 U.S. at 144, 92 S.Ct. at 1467. Thus, the doctrine of collateral estoppel precludes the appellants here from relitigating that issue.

(Pet. App. A at 16).

SUMMARY OF THE ARGUMENT

This Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), that UDC and not AUC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, collaterally estops petitioners from relitigating that issue. The Petition for a Writ of Certiorari should be denied.

ARGUMENT

The Tenth Circuit Court of Appeals held that as a matter of law, pursuant to the legal doctrine of collateral estoppel, AUC is precluded by the decision in *Affiliated Ute* from asserting that it is the authorized representative

of the mixed-blood Utes for purposes of managing those tribal assets not susceptible to equitable and practicable distribution. Petitioners argue, however, that the statements made by this Court in *Affiliated Ute* are "erroneous" dicta and therefore not binding, leaving the issue open for resolution on appeal.

Collateral estoppel, also known as issue preclusion, serves the purpose of conserving judicial resources, relieving parties of the costs and other burdens of repeated lawsuits, and, "by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*

The Tenth Circuit Court of Appeals applied the doctrine of collateral estoppel in the case at issue and concluded that the four required elements had been met. First, the issue previously decided in *Affiliated Ute* is identical with the one presented in the action in question. Second, the *Affiliated Ute* action was finally adjudicated on the merits. Third, petitioners were parties, or in privity with parties to the prior adjudication. And finally, AUC had a full and fair opportunity to litigate the authorized representative issue. (Pet. App. A at 8-16).

A. The Issue Decided In *Affiliated Ute* Is Identical With The Issue Presented By Petitioners In The Present Action.

In *Affiliated Ute* this Court noted that, in its suit against the United States, AUC sought "a determination that AUC and not UDC is entitled to manage that property [i.e., the indivisible assets of the Ute Indian Tribe] jointly with the business committee of the full-bloods." *Affiliated Ute*, 406 U.S. at 139, 141. That is precisely the issue raised by AUC in the instant case. AUC has requested a declaratory judgment "that the Affiliated Ute Citizens and not the Ute Distribution Corporation (UDC), is the mixed blood Utes' statutorily authorized representative for the management of their interests in the undivided assets of the Ute Indian Tribe. . . . " Petitioners' Petition for a Writ of Certiorari at 3.

B. The Authorized Representative Issue Presented In *Affiliated Ute*, Was Finally Adjudicated On The Merits.

The "authorized representative" issue was directly addressed and decided by this Court in *Affiliated Ute*, which held that: "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 142.

This Court's decision in *Affiliated Ute* that UDC and not AUC is the authorized representative of the mixed-bloods was not just an aside by the court or a statement made for the purpose of "argument, illustration, analogy or suggestion," all factors which indicate dicta and not ruling. *See United States v. Crawley*, 837 F.2d 291, 292 (7th

Cir. 1988) (quoting *Stover v. Stover*, 483 A.2d 783, 786 (Md. App. 1984)). To the contrary, that decision was a necessary part of this Court's decision in the *Reyos* portion of its opinion.

This Court's decision in *Affiliated Ute* resolved an issue that was central to the concerns of AUC, the United States and the Court. That concern was demonstrated by the high level of attention which the parties and the Court paid to that issue as demonstrated by the intensive briefing by the parties and extensive analysis by the Court as to both the facts and law applicable to that question.

Affiliated Ute was the resolution of the appeals of two consolidated cases referred to as the *Reyos* case and the *AUC* case. The *AUC* case was filed by AUC as a strategic move by the *Reyos* plaintiffs and AUC to provide the court with a flexible theory of recovery. The emphasis on the interdependence of *AUC* and *Reyos* was apparent throughout AUC's briefing before this Court:

> [T]he remedy fashioned [by the trial judge in *Reyos*] was fair to the extent that it left the selling and non selling Indians with approximately the same amount of payments from the mineral royalties and Indian claims through the date of trial, but it was unfair to the extent that it failed to restore the selling shareholders to the beneficial title [to the mineral estate] – and that enormously valuable interest was left with the beneficiaries of the fraud.
>
> * * *
>
> In fairness, however, the error of the trial judge was in reality the error of counsel, for the

> *Reyos* case was tried on a pure damage theory which did not afford the flexibility necessary under the *Borak* doctrine. Thus *AUC* was filed, at a point well in advance of entry of final judgment in *Reyos*, to cover the hiatus between the trial judge's selected remedy and the full restitution which is necessary. Regrettably, the trial judge failed to see the alternative remedy which *AUC* supplied.
>
> If UDC was improperly formed, a speedy, complete, and relatively inexpensive remedy is at hand – merely recognize that fact and confirm the rights of AUC ["as authorized representative"] and its members [to their "beneficial interest in the minerals. . . . "]

(App. D at 24-25).

This Court recognized the interdependence of the *Reyos* and *AUC* cases and the central importance of resolving the authorized representative issue.

> On the petition of AUC and the 12 plaintiffs [in *Reyos*] this Court granted certiorari in both cases because of the importance of the issues for indians whose federal supervision is in the process of termination.
>
> * * *
>
> **The two cases, although different, have their roots in the formation of UDC, and it is not inappropriate that the cases were consolidated and are here together.**

Affiliated Ute, 406 U.S. at 141 (emphasis added).

Based at least in part on the foregoing, the Tenth Circuit Court of Appeals held that in *Affiliated Ute*, this

Court "did reach a final decision on the merits of whether the AUC was the mixed-blood Utes' authorized representative with respect to the indivisible tribal assets." (Pet. App. A at 9). The Tenth Circuit acknowledged that had this Court decided the *AUC* case alone, the Court's discussion of whether AUC was the authorized representative of the mixed-blood Utes would have been unnecessary (since the case was dismissed for lack of subject matter jurisdiction). But the Tenth Circuit recognized, "the Court did not decide *Affiliated Ute* [*AUC*] alone, however, but rather considered it along with *Reyos*." The Tenth Circuit Court of Appeals explained:

> In order to resolve the securities and damages claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for the Court to determine whether the UDC was the mixed-blood Utes' authorized representative. . . . The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

(Pet. App. A at 11-12).

The authorized representative issue presented in the instant case was a necessary part of this Court's decision in *Affiliated Ute*, and finally adjudicated on the merits.

C. Petitioners Were Parties, Or In Privity With Parties To *Affiliated Ute*.

AUC was an appellant in the *Affiliated Ute* case and sponsored the companion *Reyos* case.[3] The individual petitioners here, an AUC member and his son, are in privity with AUC and bound by the collateral estoppel effect of *Affiliated Ute*.

The Tenth Circuit Court of Appeals held that it is "beyond dispute the [petitioner] Glen Mac Murdock's claims derive from the AUC for purposes of determining whether the AUC is the mixed-blood Utes' authorized representative." (Pet. App. A at 13). Glen Mac Murdock is a member of AUC and would no doubt benefit if petitioners should obtain the requested relief. He must be bound by the collateral estoppel effect of *Affiliated Ute* to prevent an untenable result. "If a judgment regarding an association's status did not bind its members, then each member could relitigate the association's status until the association obtained a favorable result." (Pet. App. A at 14).

Petitioner Mac Eugene Murdock, the son of Glen Mac Murdock, is not a member of AUC. However, to the extent that he would benefit from the requested relief the same reasoning applies to him as applies to his father. To the extent that he would not benefit from the requested relief he has no standing. (Pet. App. A at 13 n.6).

---

[3] The same attorneys represented AUC and the *Reyos* plaintiffs (all members of AUC), and filed a single brief in the case before this Court.

D. AUC Had A Full And Fair Opportunity To Litigate The Authorized Representative Issue.

In its initial complaint in the *AUC* case, AUC claimed: (1) that its individual members (including the *Reyos* plaintiffs) were entitled to a pro rata distribution of the mineral estate underlying the reservation, on the theory that UDC had been invalidly created and that it should be abolished and its ownership of the mixed-bloods' mineral rights terminated; and (2) that AUC, and not UDC should be declared the authorized representative of the mixed-bloods for management of the mineral estate jointly with the tribal business committee. *Affiliated Ute*, 406 U.S. at 139-40.

As a result of the emphasis by the petitioners, in both the *Reyos* and the *AUC* cases, on their contention that UDC was not validly formed and that as a consequence AUC, and not UDC, must be declared the authorized representative of the mixed-bloods, the issue was intensively briefed before this Court. *See* citations to Brief of Petitioners (App. D), *supra*.

Because of this Court's view of the importance of the UDC issue to the Indians involved and the emphasis of petitioners on the interrelated nature of the *AUC* and *Reyos* cases with regard to the validity of UDC, both as a corporate entity and as authorized representative of the mixed-bloods under the Ute Partition Act, it is not surprising that this Court specifically addressed and resolved those matters in a detailed analysis in *Affiliated Ute*. *See Affiliated Ute*, 406 U.S. at 133-136, 143-44. This Court's extensive factual and legal analysis is a direct response to the efforts AUC made to emphasize the issue through its appeal and shows that its conclusion that

UDC is the authorized representative is well grounded in the facts of the case and an integral part of the *Affiliated Ute* opinion.

Courts have followed the directive of *Affiliated Ute* since it was handed down in 1972, and recognized UDC as the authorized representative of the mixed-blood Utes. To reexamine that decision in the face of the legal doctrine of collateral estoppel would be to unravel more than twenty years of history. AUC has had its day in court on the authorized representative issue.

CONCLUSION

Based on the foregoing, Respondent UDC respectfully urges this Court to deny the Petition for a Writ of Certiorari. The decision of the Tenth Circuit Court of Appeals is not in conflict with the decision of another United States court of appeals, is not in conflict with a state court of last resort, and does not so depart from the accepted course of judicial proceedings as to merit this Court's power of supervision. Sup. Ct. R. 10.1(a). Review, by this Court, is unwarranted.

Respectfully submitted,

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APPENDIX A

CONSTITUTION OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH

PREAMBLE

We, the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah invoking the divine guidance of Almighty God, seeking to more effectively comply with the legal requirements of the United States Government and all political subdivisions to which we are, and are to become, subject, to more ably assume the new obligations in justice now to be required of us, to protect the privileges and rights we do equitably claim, to preserve the cultural values we may possess, to encourage desirable and amicable relations with other citizens of our respective communities and to promote the general welfare of all, do ordain and establish this Constitution for the Affiliated Ute Citizens of the State of Utah.

ARTICLE I.

MEMBERSHIP

The membership of the Affiliated Ute Citizens of the State of Utah shall consist of all persons whose names appear on the final mixed-blood membership roll as published in the Federal Register pursuant to Public Law 671 – 83d Congress 2nd Session (68 Stat. 868)

ARTICLE II.

Board of Directors

Section 1. The management of the affairs and the funds of the Affiliated Ute Citizens of the State of Utah shall be vested in a Board of five Directors.

Section 2. The members of the Board of Directors shall be elected for a term of two years except at the first election when three members shall be elected for a term of one year and two members for a term of two years. The members of the Board of Directors shall be elected in a manner as provided in this Constitution and the By-Laws.

Section 3. The Board of Directors shall elect by ballot one of their number president and one vice-president. The office of Secretary and treasurer may, in the discretion of said Board, be combined and said secretary and treasurer may, but need not necessarily, be members of the Board of Directors or members of this organization.

Section 4. Three directors present in person at any meeting of the Board shall constitute a Quorum. Business may be transacted by a majority vote of the Directors present at such meeting. In the case of a tie vote upon any matter, the same shall fail to pass for want of a majority vote. The presiding officer shall be entitled to vote.

Section 5. Any action of a majority of the Board of Directors, although not at a regularly called meeting, and the record thereto, if assented to in writing by all of the other members of the Board, shall always be as valid and effective in all respects as if passed by the Board at a regular meeting.

ARTICLE III.

Nominations and Elections

Section 1. Any member of the Affiliated Ute Citizens of the State of Utah twenty-one years of age or over shall be entitled to vote and hold office.

Section 2. All elections shall be by secret ballot and all nominations and elections shall be held in accordance with the By-Laws.

Section 3. The first general election shall be called by the Superintendent of the Uintah and Ouray Agency on the third Saturday following ratification of the Constitution and By-Laws and the posting of the results of the election therefor at the Uintah and Ouray Agency. Thereafter, elections shall be held in accordance with rules adopted by the board of Directors as provided in Article IV of the By-Laws.

ARTICLE IV.

Vacancies and Removal from Office

Section 1. If a member of the Board of Directors shall die, resign, be removed or recalled from office, as hereinafter provided, or be found guilty in any state or federal court of a felony or misdemeanor involving dishonesty the position shall be declared vacant and the Board of Directors shall fill the vacancy until the next general election.

Section 2. The Board may, by four affirmative votes, expel any member of said Board for neglect of duty or gross misconduct. Before any vote for expulsion is taken on the matter, the member shall be given a written statement of the charges against him at least five days before the meeting of the Board, before which he is to appear and an opportunity to answer any and all charges at such designated Board meeting. The decision of the Board shall be final.

Section 3. Upon receipt of a petition signed by one-third of the eligible voters of the organization calling for the recall of any member of the Board, it shall be the duty of the board to call an election on such recall petition. No member may be recalled in any such election unless at least fifty per cent (50%) of the legal voters of the organization shall vote at such election and such election shall carry by at least a two-thirds majority of those voting.

ARTICLE V.

Powers of the Board of Directors

Section 1. The Board of Directors shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States or the State of Utah, and subject further to all express restrictions upon such powers contained in this Constitution and By-Laws adopted pursuant thereto, and subject to review by the membership of said organization at any annual or special membership meeting.

(a) To perform all the duties and functions of the mixed-blood members as the authorized representatives thereof pursuant to and in accordance with Public Law 671- 83d Congress, 2nd Session (68 Stat. 868), and all amendments thereto.

(b) To irrevocably delegate to corporations, or the officers thereof, organized pursuant to and in accordance with Public Law 671 – 83d Congress, 2nd Session (68 Stat. 868), to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, such

powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized.

(c) To employ legal counsel, the choice and fixing of fees to be subject to the approval of the Secretary of the Interior until federal supervision over all of the members of said group and their property is terminated in the manner provided in said act.

(d) To appropriate for salaries of employees or for other purposes of the organization, any available, unobligated funds, provided, that all appropriations are within a budget previously adopted by the general membership; provided further, that all appropriations made prior to the termination of federal supervision over the members of said organization and their property shall be subject to such approval by the Secretary of the Interior as may be required by law. Any appropriation not included within a previously adopted budget must be first approved at a meeting of the membership.

(e) To take such action as may be deemed advisable to foster and encourage participation of the members of the organization in the civic affairs of the cities, towns, counties, state and the United States.

(f) To negotiate with all governmental bodies, agencies, civic and religious groups as representatives of the members hereof for the purpose of promoting the general welfare of said members.

(g) To provide for a referendum of the members of this organization whenever required under said Public Law 671 or upon any other matter deemed by the board to be necessary or desirable to the welfare or best interests of the members of this organization.

(h) To employ an executive director, if such is deemed advisable by said Board, provided, no member of the Board of Directors may be selected as such executive director.

* * *

APPENDIX B

ARTICLES OF INCORPORATION OF UTE DISTRIBUTION CORPORATION

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, as determined by Public Law 671 – 83rd Congress, approved August 27, 1954, 68 Stat. 868, acting pursuant to the provisions of said Public Law 671, as amended, and in accordance with the Plan for Distribution of the Assets of the Individual Mixed-Blood members of said Tribe, as adopted by said mixed-blood members and approved by the Secretary of the Interior, and pursuant to a resolution adopted by said mixed-blood members, and being desirous of organizing a corporation under the laws of the State of Utah on behalf of said mixed-blood members for the purpose of managing jointly with the Tribal Business Committee of the full-blood group of said Indian Tribe, as provided in said Public Law 671, all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution between said mixed-blood and full-blood groups and the members thereof, and for the purpose of distributing the net proceeds therefrom, do agree and hereby certify as follows:

ARTICLE I

Name of Corporation

The name of the corporation is Ute Distribution Corporation.

ARTICLE II

Incorporators

The names of the incorporators and their places of residence are:

Name	Residence
Albert H. Harris	Roosevelt, Utah
David H. Workman	2232 Taylor Avenue, Ogden, Utah
Lula H. Murdock	Fort Duchesne, Utah
Benny Murdock	Fort Duchesne, Utah
Preston V. Allen	Altonah, Utah

ARTICLE III

Period of Incorporation

This corporation shall exist perpetually unless sooner dissolved or disincorporated according to law.

ARTICLE IV

Purpose

The pursuit of business which it is agreed shall be carried on by this corporation shall be to manage jointly with the Tribal Business Committee of the full-blooded members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, pursuant to said Public Law 671, as amended, the aforesaid Plan for Distribution, all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe, as defined and determined by said Public Law

671, are now, or may hereafter become entitled pursuant to said Public Law 671 or the laws of the United States and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation as herein provided.

The powers of this corporation shall be limited to the joint management of such claims and assets and to the receipt and distribution of the income or proceeds therefrom together with such other powers as may necessarily be incident thereto. For the purpose of carrying any of its pursuits, business and powers, this corporation may contract with other individuals, organizations, corporations or entities.

ARTICLE V

Place of Business

The principal place of business shall be at Fort Duchesne, Utah.

ARTICLE VI

Stock

The stock of this corporation shall consist of 4,900 shares of common stock without nominal or par value. The subscribers of the stock of this corporation consist of the 490 mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, whose names appear upon the final rolls of the mixed-blood group of said tribe as determined in accordance with and pursuant to the provision of said Public Law 671, and each of said

490 members are subscribers to and each shall receive ten shares of stock.

The stockholders, in exchange for said stock, delegate to the corporation and the officers thereof, without further act or deed, authority to manage jointly with the Tribal Business Committee of the full-blood group of said Ute Indian Tribe all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution under said Public Law 671, in which said mixed-blood members have any interest, and to receive the proceeds therefrom and to distribute the same, less any necessary or incidental expense, to the stockholders hereof.

Ownership of stock in this corporation shall entitle the owner thereof to share proportionately with other stockholders in the distribution of the proceeds received by the corporation from said claims, rights and aspects, except that fifty per centum of all distributions to any individual mixed-blood member made pursuant to any division or distribution hereunder shall have deducted therefrom any sum or sums of money owed by such mixed-blood member to the tribe, whether due or to become due, unless in the opinion of the Secretary of the Interior said debts are not adequately secured in which event the entire amount to be distributed shall be subject to such offset, and any transferee of such stock shall take the same subject to such provision.

The stock of the corporation is subject to transfer, device or descent. If a mixed-blood member of said tribe, or any stockholder herein disposes of his stock, he will

not longer have a vote or any control in the affairs of the corporation, or be entitled to share in the distribution of the proceeds as hereinbefore provided, unless and until he thereafter again becomes a stockholder in the corporation. Transferees, legatees and heirs of any stock in the corporation shall acquire all rights to which a stockholder is entitled, including voting rights and the right to share in the distribution of the income or proceeds available for such distribution.

* * *

APPENDIX C

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, that the Board of Directors of the Affiliated Ute Citizens of Utah delegate the authority to all three corporations – Antelope Sheep Range Company, Rock Creek Cattle Company and the Ute Distribution Corporation, to organize in accordance with the constitution of the Affiliated Ute Citizens of the State of Utah, Article V, Section 1, Paragraph (b) as follows:

> "To irrevocably delegate to corporations, or the officers thereof, organized, pursuant to and in accordance with Public Law 671 – 83d Congress, 2nd Session (68 Stat. 868), to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized."

/s/ Elmer Hackford
Elmer Hackford,
President

/s/ Preston V. Allen
Preston V. Allen,
Vice President

/s/ Joseph A. Workman
Joseph A. Workman,
Member

/s/ Lula H. Murdock
Lula H. Murdock,
Member

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Member

CERTIFICATION

I hereby certify that the above resolution was adopted by the Board of Directors of the Affiliated Ute Citizens of the State of Utah, at a Special meeting held at Fort Duchesne, Utah, on the 7th day of January, 1959 at which a quorum was present and by a vote of 5 for and 0 against.

/s/ Crystal Welcken
Secretary, Board of Directors

RESOLUTION NO. 59-8

Affidavit No. 3, Item 12

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-v.-

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of Utah entering judgment for plaintiffs in *Reyos v. First Security Bank* (Reyos herein), and dismissing *Affiliated Ute Citizens of the State of Utah v. United States* (AUC herein) on the merits and for lack of jurisdiction, are unreported (A.[1] 573 and 564, respectively). The opinions of the Court of Appeals for the Tenth Circuit reversing

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[1] "App." refers to the Appendix of pertinent Statutes and Regulations appearing at the back of this brief. "A" refers to the separately bound Appendix of proceedings herein. "E" refers to the Exhibit volume of the Appendix. "R" refers to the Record.

the *Reyos* judgment and affirming the dismissal of *AUC* are reported at 431 F.2d 1337 and 1349, respectively (A. 576 and 587).

JURISDICTION

The decisions of the Court of Appeals were simultaneously filed in June 19, 1970. Motions for rehearing in each case were simultaneously denied on November 14, 1970 (A. 588). A petition for rehearing in banc was filed in *Reyos* but was not considered (A. 3). The Petition for Certiorari was filed on February 9, 1971 and granted on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (l).

STATUTES AND REGULATIONS INVOLVED

The Ute Termination Act (Termination Act) is published at 25 U.S.C. §§ 677-677aa, and is reproduced in its entirety at App. i-xviii. The pertinent regulations under the Termination Act, formerly published at 25 C.F.R. part 243 are reproduced at App. xviii-xx. The relevant securities provisions are section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 adopted thereunder (17 C.F.R. 240.10b-5) (Rule 10b-5 or Rule) reading as follows:

15 U.S.C. § 78j:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

QUESTIONS PRESENTED

1. Whether bankers who contract to enforce the Indian laws and regulations applying to an Indian corporation, by acting as its transfer agent, depository for the individual Indian's stock, and agent for the conduct of the business of the corporation, violate Rule 10b-5:

(a) When they secretly act simultaneously as market makers for the stock, or as agents for or in aid of non-Indian purchasers?

(b) When they cause stock transfers to be made in a manner other than as specified in the Indian laws and regulations?

(c) When they withhold information designed to discourage the Indian from selling his stock?

(d) When they alter or misrepresent documents filed with government officials primarily responsible for supervising the sale of Indian property?

2. Does the reference to conduct "in connection with the purchase or sale of any security" in Rule 10b-5 mean that the defendant must be acting in his own interest, as a purchaser or seller, for a profit?

3. Under an Indian termination act, declaring a phased withdrawal of Government services rendered to Indians and an end to supervision of their restricted property:

(a) Are the Indians deprived, by implication, of any interest in their property, or do they lose their cultural identity as American Indians so that benefits of law other than under Federal statutes are eliminated by implication?

(b) Is BIA's administrative modification or acquiescence in the modification of termination procedures prescribed by Congress, so that protections to Indians and their property are eliminated or reduced, actionable negligence?

(c) Does publication of a "termination proclamation" eliminate the Government's duty to Indians

with respect to limited supervisory functions Congress directed be performed after publication, or as to property over which the Government retains limited supervisory control?

4. The subsidiary question in *AUC* of whether the United States District Court has jurisdiction to determine an Indian's rights in property, including management rights, purportedly granted under a termination act?

5. The subsidiary question in *Reyos* of what relief is appropriate to the individual Indian?

STATEMENT OF THE CASE

A. *Summary of the Proceedings Below.*

AUC is an unincorporated association of all terminated Ute Indians formed by the Secretary of Interior (Secretary).

AUC's complaint sought confirmation of rights under the Termination Act (1) in its own behalf, to exercise management privileges for its members with respect to their unadjudicated legal claims and the mineral estate in the Uintah and Ouray Reservation (Reservation) and (2) on behalf of its 490 Indian members, declaring them to be vested with beneficial rights in the Reservation minerals. The *Reyos* plaintiffs are members of AUC who seek damages for their loss of mineral royalties and Indian claims payments from and after 1963-64, which occurred when the Bureau of Indian Affairs (BIA) caused the terminated Utes' share of the cash proceeds to be paid to a corporation in which they formerly held stock. The Indians had sold, or were induced to sell, their stock in transactions which the trial judge determined to be fraudulent, and the Indians' shares in the cash proceeds were paid to the non-Indian purchasers.

The Complaint in *AUC* was dismissed for alleged failure to state a cause of action and lack of jurisdiction. The trial judge awarded damages to the *Reyos* plaintiffs against First Security Bank of Utah, N.A., (Bank) and its officers, Gale and Haslem, under Rule 10b-5, and against the United States for negligent administration of the Termination Act. The Court of Appeals for the Tenth Circuit affirmed the dismissal of *AUC*, and reversed the judgment in *Reyos*, ruling that the United States owed no duty to the terminated Utes and that the Bank and its officers had not violated Rule 10b-5.

B. *Summary of the Termination Act.*

The Termination Act provided that as to 27.16186% of the membership of the Ute Indian Tribe (Tribe) federal supervision and services to the Indians would be ended[2] and restrictions on their property would be removed.[3] The mineral estate in the Reservation, which was both difficult to divide and an intangible asset the terminated Utes could be expected to have trouble dealing with, was excepted from the removal of "restrictions" and was to be held by the United States, with the beneficial interest retained in common among the terminated and non-terminated Utes.[4] The "termination proclamation" ending supervision of the individual Indian was published on August 26, 1961, but Congress directed that real property

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[2] Section 23, 25 U.S.C. § 677v (1964), App. xvi.

[3] Section 16, 25 U.S.C. § 677o (1964), App. xiii.

[4] *Id. See also* section 10, 25 U.S.C. § 677i (1964), App. vi at viii.

be subject to limited supervision by the Secretary, pursuant to a right of refusal in the "members of the tribe" until August 27, 1964.[5]

The mineral estate was and is subject to joint management by the "authorized representative" of the terminated Utes and the Tribe as the representative of the non terminated Utes.[6] Title to the mineral estate remains in trust with the United States for the Indians beneficially entitled to it.

C. *The "Authorized Representative" Problem.*

AUC claims that it is the "authorized representative" specified in the Termination Act, and that Ute Distribution Corporation (UDC) was improperly substituted in its stead. The authorized representative is empowered to act with the Tribe in the approval of mineral leases, but more importantly, represents the persons entitled to the cash proceeds from the minerals. If UDC is the authorized representative, the non-Indian purchasers of the UDC stock are entitled to those payments. If AUC is the proper authorized representative, those who are entitled are its Indian members.

The Termination Act provided that the authorized representative was to be selected by "an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary."[7]

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[5] Section 15, 25 U.S.C. § 677n (1964), App. xii.

[6] Section 10, 25 U.S.C. § 677i (1964), App. vi at vii.

[7] Section 6, 25 U.S.C. § 677e (1964), App. iii.

* * *

APPROPRIATE RELIEF SHOULD BE DEVISED

The trial judge recognized that UDC was unique, for it owned no assets, engaged in no business other than as authorized representative, and was a mere "conduit" through which the terminated Utes share of the proceeds from the minerals and judgment claims were paid.[162] The Indians who sold, on the other hand, were unaware of the potential value of the stock[163] and did not even have the benefit of the red letter warnings which might have alerted them to its potential value. Non-Indian buyers and sellers, many of whom were no better informed than the Indians themselves, were in turn "materially and substantially affected [in] the offer and sell prices" by the fraudulent market making activities of Gale and Haslem.[164]

The Indians, in their uniformed condition and subject to the other disadvantages determined by the trial judge, were induced to sell stock representing assets valued by plaintiffs experts at in excess of $28,000 per share.[165] At

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[162] A. 528.

[163] A. 527.

[164] A. 522.

[165] The Reservation sits on top of one of the richest known mineral structures in the world. A. 352, 356. The mineral of primary value is oil shale, containing 110,440,000 barrels of recoverable oil, A. 357-66, 404, but it also contains oil and gas A. 353, 382 and coal A. 354, 384 in known quantities, plus an assortment of other minerals the amount of which is unknown. A. 352, 378, 384. Plaintiffs witnesses Christiansen and Hamilton both testified concerning the market value of these resources, based upon actual sales transactions in 1963-64. A. 368-70, 406. Based upon Dr.

the same time, the trial judge considered that damages computed on the basis of asset value "would be incongruous with the situation of numerous mixed bloods who have retained their stock," because the possibly imprudent Indians who sold would realize values immediately which their more prudent brothers who did not sell must wait a long period of time to obtain, and elected instead to fashion a remedy taking varying account of all of these factors.[166] An assumed fair value – fair, it must be observed, with reference to those who did not sell rather than those who did – of $1500 per share was adopted.

Christiansen's estimates, which were the more conservative of the two, the actual value of the mineral assets is as follows:

Mineral	Value of total deposits underlying the Reservation	Terminated Ute's share (Col. 2 multiplied by 27.16186%)	Value per share (Col. 3 divided by 4,900)
Oil & Gas	$ 50,136,000.00	$ 13,621,249.30	$ 2,779.88
Coal	57,287,991.00	15,564,344.85	3,176.40
Oil Shale	414,150,000.00	112,518,756.90	22,963.01
Dawsonite	Present but not established	Great Potential	0
Nahcolite (trona)	Present but not established	Great Potential	0
Gilsnoite	Present but not established	Great Potential	0
TOTAL	$521,573,991.00	$141,704,351.05	$28,919.29

[166] A. 530. See also the trial judge's comments at A. 572.

The trial judge's approach was basically sound,[167] at least as far as it went:

> "We, therefore, believe that under the circumstances here *it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.* (Emphasis added.)
>
> * * *
>
> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[168] (citations omitted)

The trial judge failed to give effect to the corollary principles, that in fashioning a remedy (1) the plaintiff should be fully compensated and (2) the wrongdoer should not

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[167] *See*, generally, Story Parchment Co. v. Paterson Co. 282 U.S. 555, 562-63 (1931); Espaillat v. Berlitz Schools of Languages of America, 383 F. 2d 220, 222 (D.C. Cir. 1967); McCormack On Damages § 122 (1935). As to the propriety of considering underlying mineral values, *see* Montana Railway Co. v. Warren, 137 U.S. 348, 352 (1890); United States v. Sowards, 339 F.2d 401 (10th Cir. 1964); United States v. Silver Queen Mining Co., 285 F.2d 506 (10th Cir. 1960). Cf. Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 Harv. L. Rev. 233, 262 (1930)

[168] J. I. Case C. v. Borak, 377 U.S. 426, 433 (1964), *Accord*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386 (1970).

be rewarded with a windfall.[169] In other words, the remedy fashioned was fair to the extent that it left the selling and non selling Indians with approximately the same amount of payments from mineral royalties and Indian claims through the date of trial, but it was unfair to the extent that it failed to restore the selling shareholders to the beneficial title – that enormously valuable interest was left with the beneficiaries of the fraud.

The Court of Appeals compounded the error of the trial judge by holding that market value, *and no other factor,* could be considered in computing damages, and that "the measure of damages . . . *is the profit made by the defendants on resale of stock purchased from the plaintiff.*"[170] (Emphasis added) The latter holding is untenable as a rule of damages, runs counter to the fundamental purpose of the securities laws to protect investors, and is an open invitation to fraud committed through an agent.

In fairness, however, the error of the trial judge was in reality the error of counsel, for the *Reyos* case was tried on a pure damage theory which did not afford the flexibility necessary under the *Borak* doctrine. Thus *AUC* was filed, at a point well in advance of entry of final judgment in *Reyos* to cover the hiatus between the trial judge's selected remedy and the full restitution which is

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[169] See Mitchell v. Texas Gulf Sulphur Co., ___ F.2d ___ (10th Cir., April 26, 1971).

[170] A. 587.

necessary? Regrettably, the trial judge failed to see the alternative remedy which *AUC* supplied.[171]

If UDC was improperly formed, a speedy, complete, and relatively inexpensive remedy is at hand – merely recognize that fact and confirm the rights of AUC and its members. The United States will suffer no loss, for it makes no claim to title to the minerals and agrees that they are held in trust for those beneficially entitled to them. The *Reyos* plaintiffs, in that event, have been damaged in an amount equal to the lost royalties and other payments, distributed in the form of dividends on the stock during years between 1963-64 to present. That sum is approximately the amount awarded by the trial judge.[172] The purchasers of UDC stock, for the same reason, will not be injured for they have already recovered their investment, but as purchasers in transactions violating the Indian laws they have dealt at their peril, in any event.[173]

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[171] The pertinent dialogue between court and counsel is at A. 559-60.

[172] The value of the damage elements in findings 3, 4, & 5, A.528-29 equal $853.97 per share, and finding 4 (d), A. 503 equals $357.00 per share. In addition, mineral royalties, which averaged $71 per share per year at the time of trial A. 258, 326-28 for eight years equals $568 per share. These figures are not, of course, precise as to years subsequent to trial, and additional evidence should be taken, but the sum of all three items is $1,778.97 per share, which makes the trial judges assume value of $1500 per share look very conservative.

[173] *See* footnote 119, *supra*, and related text.

The alternative is to award the Indians judgment based upon the value of the underlying assets, which by uncontroverted evidence amounts to in excess of $28,000 per share based upon market values in 1963-64.

In either event, under the recent holding of this Court in *Mills v. Electric Auto-Lite Co.*,[174] plaintiffs should also be awarded their costs in maintaining this action, including reasonable counsel fees. Recovery of such expenses is necessary to fully restore the terminated Utes to the position of the non-selling Indians. Counsel fees, moreover, should comprehend the recovery of the mineral estate, for if they do not, other lawyers will surely not be so foolhardy as to undertake the enormous expenditure of effort necessary to right social injustices such as are involved in this case.

CONCLUSION

The facts of this case present, once more, the recurring problem of the clash between the Indian culture, with its orientation to human values and the common enjoyment of natures bounty, with non-Indian American society, with its fixation on personal property rights and the profit motive. The plight of the terminated Ute is the plight of the entire Indian community in microcosm, and is not so much a criticism of either culture as it is a study in why a whole culture cannot be changed with the stroke of a legislator's pen and why rules against overreaching,

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[174] 396 U.S. 375 (1970). *See also*, Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939).

whether they be a part of the Indian laws or the securities laws, should not be relaxed.

As in the past, it is the solemn duty of the courts to fairly adjust rights in the event of such a clash. In this case, such an adjustment should include (1) confirmation of AUC's rights as authorized representative, (2) confirmation of AUC's members beneficial interest in the minerals and (3) damages equivalent to the cash proceeds the Indian has been deprived of.

Respectfully submitted,

PARKER M. NIELSON
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Salt Lake City, Utah
Attorney for petitioners

Supreme Court, U.S.
FILED
MAR 31 1993
OFFICE OF THE CLERK

(5)

No. 92-1149

In the Supreme Court of the United States

OCTOBER TERM, 1992

GLEN MAC MURDOCK, ETC., ET AL., PETITIONERS

v.

UTE DISTRIBUTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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Salt Lake City, Utah 84138

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether this Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), which held that the Ute Distribution Corporation is the authorized representative of mixed-blood Utes for purposes of managing indivisible tribal assets, collaterally estops petitioners from relitigating that issue.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1149

GLEN MAC MURDOCK, ETC., ET AL., PETITIONERS

v.

UTE DISTRIBUTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 975 F.2d 683. The opinion of the district court (Pet. App. 17-20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1992. On November 30, 1992, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 7, 1993. The petition for a writ of certiorari

was filed on January 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a nearly 25-year-old dispute over which organization, the Ute Distribution Corporation (UDC) or the Affiliated Ute Citizens of the State of Utah (AUC), is the authorized representative of the "mixed-blood Utes" for purposes of managing certain Ute tribal assets.

1. The Act of August 27, 1954 (Ute Indian Supervision Termination Act), ch. 1009, 68 Stat. 868, 25 U.S.C. 677-677aa, pertained to the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. Section 1 of the Act stated its purpose: "to provide for the partition and distribution of the assets of the * * * Tribe * * * between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U.S.C. 677. Section 6 of the Act authorized the mixed-blood Utes to organize, to adopt a constitution and bylaws, and to provide, by that constitution, for the selection of authorized representatives with power "to take any action that is required by [the Act] to be taken by the mixed-blood members as a group." 25 U.S.C. 677e. Section 10 of the Act stated that after the final membership roll of the mixed-blood and full-blood groups had been published, the Tribal Business Committee, representing the full-bloods, and the authorized representative of the mixed-bloods would

commence division of the assets of the Tribe that were susceptible to equitable and practicable distribution. 25 U.S.C. 677i. A portion of the tribal assets—including gas, oil, and mineral rights, and unadjudicated or unliquidated claims against the United States—were classified as "not susceptible to equitable and practical distribution." 25 U.S.C. 677*o*(a). These "indivisible" assets were to be "managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." 25 U.S.C. 677i.

2. The mixed-blood Utes' "authorized representative" for purposes of the indivisible tribal assets was initially the AUC, an unincorporated association. The AUC delegated its authority to the UDC in 1959. The UDC issued ten shares of stock to each member of the mixed-blood group to represent his or her interest in the indivisible tribal assets. Pet. App. 3-4. A number of mixed-blood Utes subsequently sold their shares at prices later determined to be substantially lower than the stock's actual value. Those transactions gave rise in 1968 to two lawsuits.

In *Reyos* v. *United States*, 85 mixed-blood Utes sued a bank that had acted as transfer agent for the shares of UDC stock, as well as two of the bank's officers. The *Reyos* plaintiffs argued that the bank and its officers had violated securities laws by encouraging mixed-blood Utes to sell their UDC stock at disadvantageous prices. The United States was later added as a defendant when the plaintiffs alleged that the government had breached a trust obligation by failing to oversee the plaintiffs' improvident sales of the UDC stock and to prevent

fraud in connection with those sales. The district court held for the plaintiffs in their suit against the bank and its officers, and also found the United States liable for breaching a duty to the plaintiffs. The court of appeals reversed in part and remanded. It found the bank and its officers liable, but to a lesser extent than the district court had found. The court of appeals held that the United States was not liable, concluding that it owed no duty to the plaintiffs in connection with their sales of stock. *Reyos* v. *United States*, 431 F.2d 1337 (10th Cir. 1970); see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 140-141 (1972).

While the *Reyos* case was pending in the district court, the AUC filed the *Affiliated Ute Citizens* case against the United States. In *Affiliated Ute Citizens*, the AUC sought: (1) pro rata distribution to the individual members of the mixed-bloods' percentage share of the indivisible mineral estate underlying the Reservation; and (2) a declaration that the AUC and not the UDC was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible assets jointly with the Tribal Business Committee. The United States filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court granted that motion, and the Tenth Circuit affirmed. *Affiliated Ute Citizens* v. *United States*, 431 F.2d 1349 (1970); see *Affiliated Ute Citizens*, 406 U.S. at 139-140.

On petitions for a writ of certiorari, this Court granted review in both *Reyos* and *Affiliated Ute Citizens* and consolidated the cases for argument and decision. 406 U.S. at 141. The Court affirmed the

Tenth Circuit's ruling in *Affiliated Ute Citizens* that the AUC's action against the United States for outright distribution of the mixed-bloods' percentage of the mineral estate "was properly dismissed for want of jurisdiction." *Id.* at 143. This Court then considered the AUC's contention that it (rather than the UDC) was the mixed-bloods' authorized representative for purposes of managing the mineral interest with the Tribal Business Committee. The Court concluded: "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. In the *Reyos* case, as to the claim against the United States, the Court affirmed the decision of the court of appeals that the United States had no duty to the plaintiffs regarding their sales of the stock. *Id.* at 149-150. The Court also affirmed the court of appeals' holding that the bank and its officers were liable for violation of the securities laws, *id.* at 150-154, although, disagreeing with the court of appeals, it reinstated the district court's award of damages based on a valuation of UDC stock at $1500 per share, *id.* at 154-157.

3. In 1989, petitioners AUC, Glen Mac Murdock, Jr. (a mixed-blood Ute and AUC member), and Mac Eugene Murdock (Glen's son, who is not a mixed-blood Ute and consequently not an AUC member) filed suit against the Tribe, the UDC, and the Secretary of the Interior. They sought various relief, including a declaratory judgment that the AUC, and not the UDC, was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible tribal assets. The UDC and the Secretary

contended that collateral estoppel prevented petitioners from relitigating the authorized-representative issue. Pet. App. 3-4, 13 & n.6. The district court agreed and dismissed the suit. Pet. App. 17-20.

The court of appeals affirmed. Pet. App. 1-16. It first identified and analyzed each of the four elements necessary to establish collateral estoppel: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or is in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. Pet. App. 8; see Pet. App. 8-16. The court then concluded: "The Supreme Court's decision in *Affiliated Ute Citizens* v. *United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity 'entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.' Thus, the doctrine of collateral estoppel precludes [petitioners] from relitigating that issue." Pet. App. 16 (citation omitted).

ARGUMENT

Petitioners contend (Pet. 11-21) that this Court's decision in *Affiliated Ute Citizens/Reyos* does not collaterally estop them from seeking a declaratory judgment that the AUC is the authorized representative of the mixed-blood Utes for purposes of managing

indivisible tribal assets.[1] The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 11-12) that the issue they raise in this case is not the same issue decided by this Court in *Affiliated Ute Citizens/Reyos*. That contention is without merit.

In the district court, petitioners sought a declaratory judgment that "the plaintiff AUC, and not the UDC, is the authorized representative of the mixed blood Utes for purposes of the 'joint management' of indivisible assets of the Ute Indian Tribe." Pet. App. 9. In the *Affiliated Ute Citizens/Reyos* litigation, the AUC instituted suit against the United States seeking "a determination that AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. This Court decided that issue by concluding that "[c]learly, it is UDC and not AUC that is entitled to

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[1] The petition presents only the issue whether this Court's decision in *Affiliated Ute Citizens/Reyos* bars petitioners from relitigating the authorized-representative issue. See Pet. i. We note, however, that the district court held that a number of other decisions had also resolved that issue and bar petitioners from relitigating it. See Pet. App. 19; see also, *e.g.*, *Maldonado* v. *Hodel*, 977 F.2d 596 (10th Cir. 1992) (Table), aff'g 683 F. Supp. 1322 (D. Utah 1988); *United States* v. *Felter*, 752 F.2d 1505 (10th Cir. 1985). Because it found that this Court's decision in *Affiliated Ute Citizens/Reyos* precludes petitioners from relitigating the issue, the court of appeals did not address the preclusive effect of those other decisions. See Pet. App. 4 n.3.

manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The court of appeals thus correctly concluded that "[t]he issue [petitioners] are attempting to litigate is the same as the one addressed previously by the Supreme Court." Pet. App. 9.

2. Petitioners next contend (Pet. 12-13) that this Court did not finally adjudicate the authorized-representative issue in *Affiliated Ute Citizens/ Reyos* because resolution of that issue was unnecessary to the judgment. See *Block* v. *Commissioners*, 99 U.S. 686, 693 (1879). That contention is erroneous for two independent reasons.

a. This Court's decision in *Affiliated Ute Citizens/Reyos* had two distinct components—the portion addressing the *Affiliated Ute Citizens* litigation and the portion addressing the *Reyos* litigation. See 406 U.S. at 141-144, 144-154; Pet. App. 11 ("The Court did not decide *Affiliated Ute* alone, however, but rather considered it along with *Reyos*."). In order to resolve the securities claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for this Court "to determine whether the UDC was the mixed-blood Utes' authorized representative." Pet. App. 11. As the court of appeals explained (Pet. App. 11-12):

> The Supreme Court concluded that the bank and two of its officers had violated the securities laws and that the district court had properly computed damages. In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued and had to determine the fair value of that

> stock. The district court had assessed the value of the UDC stock based on the assets held by the corporation, namely, the mineral rights, the unliquidated and unadjudicated claims against the United States, and all other indivisible tribal assets. Revenue[s] from such assets were determined to be payable to the UDC and ultimately to be disbursed as dividends to the UDC stockholders. The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

The court of appeals thus correctly recognized that resolution of the authorized-representative issue "was a necessary part of the Court's decision in the *Reyos* portion of its opinion." Pet. App. 9-10.

b. Moreover, in deciding the *Affiliated Ute Citizens* aspect of the case, this Court considered two separate issues: (1) the AUC's claim that the United States was required to distribute to the mixed-blood Utes their "percentage of the mineral estate"; and (2) the AUC's request for a declaration that "AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. On the first issue, the Court noted that the district court did not have jurisdiction to entertain a suit in which a plaintiff sought property (or money)

from the United States unless the United States had consented to the suit. *Id.* at 141-143. Finding no such consent, the Court ruled that there was no jurisdiction to entertain that claim. *Id.* at 143.

With respect to "AUC's prayer for a determination as to management rights," 406 U.S. at 143, however, the Court reached the merits and concluded that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The Court did not address the jurisdictional basis for deciding that question. Contrary to petitioners' assertions (Pet. 6, 12-13), however, that omission does not mean that the Court implicitly believed it had no jurisdiction to consider the issue, and nevertheless proceeded to address it in dicta. In fact, the more logical explanation is that the Court believed it had jurisdiction to decide "AUC's prayer for a determination"—a declaratory judgment—"as to management rights," 406 U.S. at 143, just as petitioners necessarily contend in this case that the district court has jurisdiction to determine the same issue. See Pet. App. 18. In sum, this Court in the *Affiliated Ute Citizens* portion of the case did decide that "it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods," 406 U.S. at 144, and its decision on that issue was necessary to dispose of the AUC's request for a determination of that very issue.

3. There is no merit to petitioners' assertion (Pet. 13-15) that they are not in privity with the plaintiffs in *Affiliated Ute Citizens/Reyos*. First, the claim of the individual petitioners is derivative of the claim of

the AUC. "To the extent that Glen Mac Murdock would benefit if relief were obtained, he would do so only in a derivative capacity owing to his status as a member of the AUC." Pet. App. 13. That conclusion follows from the fact that "[i]f the courts were to declare the AUC the mixed-blood Utes' authorized representative, the AUC could then provide benefits (in whatever form) from the indivisible tribal assets to its members." *Ibid.*[2]

Second, the AUC was a party to the *Affiliated Ute Citizens* litigation, and thus is bound by that decision. Moreover, even assuming this Court's conclusion that the UDC was the mixed-bloods' authorized representative was unnecessary to the decision in *Affiliated Ute Citizens*, that does not advance petitioners' cause because the AUC is in privity with the plaintiffs in the *Reyos* case. As the court of appeals explained:

> The AUC sponsored the companioned *Reyos* case. All the plaintiffs in the *Reyos* case were members of the AUC. The AUC brought the *Affiliated Ute* case to provide an alternative remedy to the damages it viewed as inadequate in the *Reyos* case. The same attorneys represented the petitioners in both cases before the Supreme

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[2] Petitioner Mac Eugene Murdock, the son of Glen Mac Murdock, is not a member of the AUC. However, to the extent Mac Eugene Murdock would not benefit from a declaratory judgment that the AUC is the legitimate representative of the mixed-blood Utes, he has no standing to raise that issue. To the extent he would benefit from a judgment in favor of petitioners, he is precluded to the same extent as his father. Pet. App. 13 n.6.

> Court and filed a single brief. The AUC cannot now argue that its interests were not adequately represented during the *Reyos* litigation. Where an organization brings litigation in the name of individuals but retains "effective control", "[o]rdinary principles of preclusion by participation and control suggest that the organization should be subject to issue preclusion in later litigation."

Pet. App. 14 (quoting 18 C. Wright & A. Miller, *Federal Practice and Procedure* § 4456, at 492 (1981)). Accordingly, the court below properly concluded that the AUC is in privity with the plaintiffs in the *Reyos* case.

4. Finally, the court of appeals properly rejected petitioners' contention (Pet. 16-21) that they did not have a full and fair opportunity to litigate the authorized-representative issue in *Affiliated Ute Citizens/Reyos*. The AUC raised the authorized-representative issue in its complaint in *Affiliated Ute Citizens*. Pet. App. 15. In this Court, the AUC briefed the issue *and* asked the Court to decide it. *Ibid.* And the Court did decide it. 406 U.S. at 144. Clearly, then, the AUC extensively litigated the authorized-representative issue during the course of the *Affiliated Ute Citizens/Reyos* case. The AUC's real objection at this point is that this Court resolved the issue against the AUC. See Pet. App. 15-16 ("In fact, the AUC does not object to the Supreme Court's addressing the issue; rather, it objects only to the fact that the Supreme Court resolved the issue against it."); see also Ute Indian Tribe Amicus Br. App. B (reproducing rehearing petition filed by the AUC and Reyos in this Court, which argued that the

Court erred in its resolution of the authorized-representative issue but did not argue that the Court did not or should not have resolved the issue).[3] But

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[3] Petitioners submit that this Court's decision on the authorized-representative issue was erroneous because the Court made a factual mistake regarding formation of the UDC. Pet. 16-21. Even assuming petitioners could avoid collateral estoppel, their contention is incorrect on the merits. After the UDC was formed in 1958 to manage mineral rights and unadjudicated claims against the United States jointly with the Tribal Business Committee, the AUC delegated authority to the UDC by Resolution No. 59-8 (Jan. 7, 1959). The delegation from AUC in Resolution No. 59-8 authorized the UDC "to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation." The Court's ruling in *Affiliated Ute Citizens/Reyos* on the delegation of authority from the AUC to the UDC was thus correct. Moreover, contrary to petitioners' intimation (Pet. 16-17), this Court did not state that formation of the UDC was approved by the members at a tribal meeting on July 14, 1956. In any event, even if this Court had believed that formation of the UDC was approved by the members in 1956, that mistake was irrelevant to the Court's analysis. In the section of the opinion rejecting the AUC's claim that it was the authorized representative, the Court never mentioned or cited the meeting of July 14, 1956, or Resolution No. 56-66 (August 13, 1956) (reproduced at Pet. App. 46-47), which arose out of that meeting. See 406 U.S. at 143-144. The Court instead discussed and relied on the facts that the "UDC was formed by mixed-bloods in 1958 specifically to manage mineral rights and unadjudicated claims against the United States jointly with the business committee," and that the "AUC approved UDC's articles and by resolution delegated authority to UDC to act in accord with those articles." *Id.* at 143. Petitioners do not challenge those factual statements by the Court, which were the basis for its ultimate legal conclusion that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and

that, of course, is not a basis for avoiding the doctrine of collateral estoppel. The court of appeals correctly concluded that "the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets." Pet. App. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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mineral rights with the committee of the full-bloods." *Id.* at 144.

MOTION FILED
MAR 10 1993

No. 92-1149

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., et al.,

Petitioners,

vs.

UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUAL J. LUJAN, Secretary of the United States Department of the Interior,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION OF UTE INDIAN TRIBE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* AND *AMICUS CURIAE*

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3-11

MOTION OF UTE INDIAN TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI*

The Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, (the "Tribe") through its attorneys and pursuant to Supreme Court Rule 37.4, respectfully moves this Court for leave to file a brief as *amicus curiae* in opposition to the Petition for Writ of *Certiorari*. Letters from counsel for the Respondents, the Ute Distribution Corporation and the United States, consenting to the Tribe's participation in this proceeding as *amicus curiae* are included in Appendix A to the *amicus* brief included with this motion. *See* S.Ct. Rule 37.2. Counsel for the Petitioners, the Affiliated Ute Citizens, Glen Mac Murdock, and Mac Eugene Murdock refused to consent to the Tribe's participation. The nature of the Tribe's interest, set forth below, will provide this Court with a unique perspective from which to review the issues raised in this proceeding.

DISCUSSION

The question presented in the Petition for Writ of *Certiorari* is whether this Court's decision in *Affiliated Ute Citizens of the State of Ute v. United States et al.*, 406 U.S.

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* The Tribe was named as an Appellee before the Tenth Circuit and joined in the joint brief filed by the Ute Distribution Corporation and the United States. Therefore, although not named as a Respondent in the Petition, the Tribe qualifies as a party to this proceeding. *See* S.Ct.Rule 12.4.

128 (1972), holding that the Ute Distribution Corporation is the authorized representative of the mixed-blood Ute Indians for purposes of jointly managing indivisible assets of the Ute Indian Tribe under the Ute Partition Act, 25 U.S.C. §§ 677-677aa, precludes the Affiliated Ute Citizens and its privies from relitigating the question of its authority to jointly manage those assets. The Tribal Business Committee is the governing body of the Tribe, *see* Article III, Section 1, Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation, and is authorized to manage the indivisible assets of the Tribe by section 10 of the Ute Indian Supervision Termination Act of August 27, 1954, 68 Stat. 868, as amended, codified at 25 U.S.C. §§ 677-677aa (the "Ute Partition Act").

Since 1959, the Ute Tribal Business Committee has jointly managed the indivisible assets of the Tribe with the Ute Distribution Corporation (the "UDC") in accordance with the terms of the Ute Partition Act. In 1972, this Court held that the UDC, as opposed to the Affiliated Ute Citizens (the "AUC"), was entitled to manage the indivisible assets of the Tribe with the Tribal Business Committee. *See Affiliated Ute*, 406 U.S. at 144. The United States has established regulations that recognize the authority of the Tribal Business Committee on behalf of the full-bloods, and the UDC on behalf of the mixed-bloods to jointly manage the indivisible tribal assets as described in the Ute Partition Act. *See* 25 CFR Part 217 (1992).

The Tribe has cooperated and jointly managed the indivisible tribal assets with the UDC for more than 40

years. Its reliance on the legitimacy of the UDC to act as the mixed-blood's authorized representative has been confirmed by this Court in *Affiliated Ute*, the Court of Appeals for the Tenth Circuit,** the District Court for the District of Utah,*** and the Department of the Interior.**** The Tribe is vitally concerned that its interests developed over the past 40 years and its joint management of the Tribe's most valuable resources not be disrupted. It maintains a significant interest in ensuring that the judgment of this Court in *Affiliated Ute*, on which the Tribe has relied, not be altered and is protected from collateral attack. Petitioners should not now be permitted to deny this Court the opportunity to hear from the Tribe, with whom the Petitioners incorrectly allege they share responsibility for managing the indivisible assets of the Tribe.

WHEREFORE, the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, respectfully requests that this

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** *See Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990); *aff'g* 683 F.Supp. 1322 (D. Utah 1988).

*** *See Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981).

**** *See* 25 CFR Part 217. *See also Affiliated Ute*, 406 U.S. at 144, wherein this Court discussed actions taken by Congress in reliance on the legitimacy of the UDC.

Court GRANT its Motion to File Brief *Amicus Curiae* in Opposition to the Petition for Writ of *Certiorari*.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah (the "Tribe") are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Opposition to Petition for Writ of *Certiorari* and are incorporated herein by reference.

STATEMENT OF THE CASE

Because the matter presented to the Court for review is of limited applicability and significance, and is a matter which the Court has previously decided with no intervening change in the applicable law, the Court should decline to issue a writ of *certiorari* in this action.

A. Background

In the 1950's, Congress pursued a policy of assimilating Indians into mainstream American society. The prevailing theory, since refuted, was that Indians would prosper socially and economically if their tribal ties were severed.

In pursuit of its policy of assimilation, Congress enacted a series of statutes that terminated federal supervision over select Indian tribes whose members the Secretary of the Interior had deemed capable of competing successfully in society at large. With respect to one tribe, and one tribe only, i.e., the Ute Indian Tribe, Congress terminated federal supervision over some members, but retained the federal government's trust responsibility

over other members of the Tribe. *See* Ute Indian Supervision Termination Act of August 27, 1954, 68 Stat. 868, as amended, codified at 25 U.S.C. §§ 677-677aa (the "Ute Partition Act").[1] Eventually, approximately 27.5 percent of the then-tribal members were terminated as "mixed-bloods".

Before termination, all of the members of the Tribe were the beneficial owners of lands, minerals and other resources located on and under the Uintah and Ouray Reservation. In order to provide for the equitable distribution of those assets between the terminated "mixed-blood" Utes and non-terminated "full-blood" Utes, Congress enacted the Ute Partition Act. The Act "provide[d] for the partition and distribution of the assets of the . . . Tribe . . . between the mixed-blood and full-blood members thereof [and] for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe . . . " 25 U.S.C. § 677.

Approximately 27.5 percent of the Tribe's land and other disposable assets were sold, transferred or conveyed in accordance with the terms of the Ute Partition Act, *see* 25 U.S.C. §§ 677h-677m, with the proceeds benefitting the terminated mixed-bloods. Those "assets not susceptible to equitable and practicable distribution", including "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of

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[1] This Court provided a detailed discussion of the terms and history of the Ute Partition Act in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 132-39 (1972) (hereafter *"Affiliated Utes"*).

every kind, and all other assets not susceptible to equitable and practicable distribution" remained under the supervision of the Secretary of the Interior. *See* 25 U.S.C. § 677i.[2] These indivisible tribal assets were to be jointly managed by the Tribal Business Committee on behalf of the full-bloods and the "authorized representative" of the mixed-bloods. *Id.*

In 1956, the former mixed-blood members of the Tribe initially organized an unincorporated association titled the Affiliated Ute Citizens (the "AUC") as their authorized representative in conformance with the terms of the Ute Partition Act. *See* 25 U.S.C. § 677e; *Affiliated Ute*, 406 U.S. at 135-36. In 1958, AUC's board of directors, in accordance with AUC's constitution, *Affiliated Ute*, 406 U.S. at 135-36, organized the Ute Distribution Corporation (the "UDC") as the authorized representative of the mixed-bloods. The UDC's stated purpose was

> to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now, or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation. . . .

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[2] The assets subject to joint management will be collectively referred to in this brief as the "indivisible tribal assets."

Affiliated Ute, 406 U.S. at 136. Eventually, in January, 1959, AUC's board of directors "irrevocably delegated authority to UDC . . . to accomplish the purposes for which [it] was formed. UDC then issued 10 shares of its capital stock in the name of each mixed-blood Ute. . . . " *Id.* at 136. The shares of stock were freely transferrable and those mixed-bloods who did transfer their stock were prohibited from further participation in the affairs or proceeds of the UDC. *See* UDC Articles of Incorporation, Article VI, *Stock*.[3]

In 1972, this Court consolidated two cases involving the mixed-bloods, AUC and UDC. In the first, *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (10th Cir. 1970), *aff'd*, 406 U.S. 138 (1972) (hereafter referred to as "*AUC v. U.S.*"), AUC sought division of the Tribe's mineral estate *and* a declaration that it, rather than the UDC was the authorized representative of the mixed-bloods for the purpose of managing indivisible tribal assets. *See Affiliated Ute*, 406 U.S. at 139-40. In the second, *Reyos v. United States*, 431 F.2d 1337 (10th Cir. 1970), *aff'd*, 406 U.S. 128 (1972) (hereafter referred to as "*Reyos*"), individual mixed-bloods sought damages for violations of various securities laws in the sale of their UDC stock and for the Secretary of the Interior's failure to stop the sales. *See Affiliated Ute*, 406 U.S. at 140. The Court recognized that "[t]he two cases, although different, *have their roots in the formation of UDC*. . . . " *Id.* at 141 (emphasis added). The Court went on to hold that:

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[3] The Tribe has a first right of refusal to purchase any UDC shares put up for sale. The Tribe now owns approximately 17.5% of the outstanding UDC stock.

> [c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.

Id. at 144.

B. Nature and Disposition of the Proceedings Below

Petitioners AUC, Glen Mac Murdock and Mac Eugene Murdock filed this action in the Federal District Court for the District of Utah seeking in part to enjoin the Tribe's method of joint management of the indivisible hunting and fishing rights of the Tribe. In support of AUC's authority to request relief against the Tribe, Petitioners once again sought declarations that: 1) AUC, not the UDC, was the authorized representative of the mixed-bloods for the purpose of joint management of the indivisible tribal assets; 2) UDC had no legal power or authority to manage the assets of the mixed-bloods; and 3) UDC had no legal authority to issue or sell stock representing ownership of or a beneficial interest in the indivisible assets. *See* Verified Complaint, *Murdock v. Ute Indian Tribe*, Civil No. 89-C-982G (filed in D. Utah Oct. 30, 1989).[4]

UDC and the United States filed Motions to Dismiss AUC's claim that it was the mixed-bloods' authorized representative, in part based upon the preclusive effect of this Court's determination in *Affiliated Ute* that UDC was the authorized representative of the mixed-bloods for the

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[4] The claim for declaratory relief was directed against the Secretary of the Interior for approving the formation of the UDC and against the UDC itself.

purpose of jointly managing the indivisible tribal assets. The district court agreed and dismissed the claims against the UDC, and the Secretary of the Interior holding that this Court's decision in *Affiliated Ute,* as well as several subsequent lower court decisions,[5] precluded, or collaterally estopped, the Petitioners from claiming that AUC rather than UDC was the mixed-bloods' authorized representative. Order, *Murdock v. Ute Indian Tribe,* No. 89-C-982G, Slip Op. at 3-4 (D. Utah Oct. 19, 1990) (reproduced in Petition for Writ of *Certiorari* at Appendix B).[6]

The district court entered final judgment on the collateral estoppel issue, and Petitioners appealed to the Court of Appeals for the Tenth Circuit. Following an extensive analysis of the application of the doctrine of collateral estoppel, a panel of the Tenth Circuit affirmed the ruling of the district court. The Tenth Circuit held that this Court's opinion in *Affiliated Ute* "precludes the appellants from relitigating [the authorized representative] issue." *Murdock v. Ute Indian Tribe,* 975 F.2d 683, 684 (10th Cir. 1992) (reproduced in the Pet., App. A).

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[5] The decisions relied on by the district court included *Maldonado v. Hodel,* No. 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *Ute Distribution Corp. v. United States,* 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds,* 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank,* 521 F.Supp. 541 (D. Utah 1981).

[6] The Petition will hereafter be referred to as "Pet. at ___" and its appendices as "Pet., App. ___".

SUMMARY OF ARGUMENT

The Tribe, in its *amicus* brief, will bring to the Court's attention relevant matters not previously addressed in the Petition. *See* S.Ct. Rule 37.1. The Tribe addresses AUC's claim from its unique perspective as the entity responsible[7] for jointly managing the indivisible tribal assets with the authorized representative of the mixed-bloods and as the owner of 854 shares of UDC stock. For more than 40 years, the Tribe has relied upon AUC's delegation of joint management authority to the UDC. This Court recognized the legitimacy of that delegation in *Affiliated Ute*. The Tribe, and the United States have relied and acted upon that decision in developing *with the UDC* programs and procedures for the joint management of indivisible tribal assets.

AUC presented and fully briefed the authorized representative issue to this Court in *Affiliated Ute*. It recognized that the Court decided the issue when it sought rehearing. AUC cannot now, 20 years after the fact, relitigate an issue that has been unequivocally determined by this Court on the merits. The Tenth Circuit's holding that AUC and its privies are precluded from relitigating the authorized representative issue by virtue of this Court's previous decision on that very issue is clearly correct and the Petition should be denied.

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[7] The Ute Partition Act assigns joint management responsibility to the Tribal Business Committee on behalf of the full-bloods who constitute the Ute Indian Tribe after the effective date of the mixed-blood termination. *See* 25 U.S.C. §§ 677d & 677i.

REASONS THE WRIT SHOULD BE DENIED

A. The Decision of the Tenth Circuit, That AUC is Precluded From Relitigating the Authorized Representative Issue, Is Supported By, and Does Not Conflict With, Other Decisions of This Court and of the Federal Courts on the Identical Issue.

The Tenth Circuit correctly found that this Court's decision in *Affiliated Ute*, 406 U.S. 128, was a final determination on the issue of whether AUC or UDC was the legally constituted representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. In *Affiliated Ute*, the Court had consolidated two lower-court actions which, Petitioners acknowledge, arose in the same factual context. *See* Pet. at 6.

In *AUC v. U.S.*, 431 F.2d 1349, AUC, on its own behalf and on behalf of the mixed-bloods, brought suit against the United States, seeking, among other things, a determination that AUC and not the UDC was the authorized representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. *See Affiliated Ute*, 406 U.S. at 139; Pet. at 5.[8] In *Reyos*, 431 F.2d 1337, 85

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[8] AUC maintains that the authorized representative issue "was not raised or decided in the district court, or in the Court of Appeals." *See* Pet at 16. However, earlier in the same Petition, AUC admits that the authorized representative issue *was* clearly before the federal courts in the *Affiliated Ute* case. *See* Pet. at 5 (acknowledging that the plaintiffs in *Affiliated Ute* specifically requested a "determination that the AUC and not the UDC [was] entitled to manage [the mineral estate underlying the reservation] jointly with the business committee of the full blood Utes."). AUC can not have it both ways: either the issue was or was not properly before the courts. Because AUC admits

mixed-blood Utes, all of whom were members of AUC, *see Murdock*, 975 F.2d at 689 (Pet., App. 14), sought relief against, among others, the Secretary of the Interior for damages they allegedly suffered in connection with their sale of UDC stock. The plaintiffs argued that, by not preventing the sale of UDC stock, the Secretary had violated duties he owed the mixed-bloods under the terms of the Ute Partition Act. *See Affiliated Ute*, 406 U.S. at 140, 149-50.

The Court consolidated the *AUC v. U.S.* and *Reyos* cases because "the two cases, although different, have their roots in the formation of the UDC. . . . " *Affiliated Ute*, 406 U.S. at 141. The same attorneys that represented AUC in *AUC v. U.S.* represented the individual plaintiffs in *Reyos* and filed a single brief with this Court in the consolidated case. *See Murdock*, 975 F.2d at 689 (Pet., App. 14). This Court concluded that AUC had lawfully created UDC and had irrevocably delegated to UDC the authority to manage, with the Tribal Business Committee, the mixed-blood Utes' interests in the indivisible tribal assets. 406 U.S. at 136, 144.[9]

Almost 20 years later, AUC argued before the Tenth Circuit that this Court's determination in *Affiliated Ute*

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that *it* raised the authorized representative issue in *Affiliated Ute*, its argument now advanced to this Court that the issue was not properly raised must fail.

[9] The Court concluded its review of the formation of the UDC by holding that "[c]learly, it is the UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of full-bloods." *Affiliated Ute*, 406 U.S. at 144.

that UDC was the legally created authorized representative was not necessary to a determination of the consolidated cases. *See Murdock*, 975 F.2d at 687-88 (Pet., App. 10-12). However, the Tenth Circuit rejected AUC's argument, and correctly found that

> [i]n order for the [Supreme] Court to evaluate the issue of damages for loss of UDC stock [raised in *Reyos*], the Court had to conclude that the stock was validly issued and had to determine the fair value of that stock. . . . [T]he Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also *had to conclude* that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible assets, and the stock it issued would have been worthless.

Id. at 688 (Pet., App. 11) (emphasis added).[10]

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[10] Even Justice Douglas, who wrote the dissenting opinion in *Affiliated Ute*, acknowledged that the predicate issue to deciding the claims raised in *AUC v. U.S.* and in *Reyos* was whether UDC was properly created and was lawfully delegated the authority to manage the indivisible tribal assets on behalf of the mixed-blood Utes. *See Affiliated Ute*, 406 U.S. at 158-59 (Douglas, J., dissenting). Unfortunately for the present Petitioners, a majority of this Court disagreed with Justice Douglas' conclusion that UDC had not been properly created as the mixed-bloods' authorized representative.

Justice Douglas also recognized that the plaintiffs and issues in *AUC v. U.S.* and *Reyos* were inextricably linked. He identified the Petitioners as "an unincorporated association of mixed-blood Utes and individuals of that group." *Id.* at 157. "They", he continued, "sought damages, in the District Court,

The Tenth Circuit's analysis conforms to the law of corporations. If UDC had been improperly created, any stock it issued would have been in violation of the law and would have been worthless. *Id. See generally* 11 Fletcher Cyclopedia of Corporations, § 5167 (1986). As a consequence, the *Reyos* plaintiffs would have been entitled to damages for the sale, rather than the fair market value of the stock and would have retained their ownership interest in the indivisible tribal assets. The Court, however, upheld the award of damages based only on the fair market value of the stock, *see Affiliated Ute,* 406 U.S. at 155, necessarily concluding that the UDC had been legally formed and the UDC stock validly issued. *See Murdock,* 975 F.2d at 688 (Pet., App. 11-12). The authorized representative issue was clearly decided in *Affiliated Ute,* and neither AUC nor its privies can once again dispute that issue. *See generally Montana v. United States,* 440 U.S. 147, 153 (1979); 18 Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction § 4416 (1981); Restatement (Second) Judgments, § 27 (1982).

Without exception, in the intervening 20 years since this Court issued its decision in *Affiliated Ute,* the lower federal courts have concluded, as did the Tenth Circuit in the instant case, that UDC is the duly constituted authorized representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. *See Maldonado v. Hodel,* No. 89-4035, Slip Op. (10th Cir. June 28,

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for fraudulent securities transactions, for negligence by agents of the Federal Government, and for the deprivation of statutory rights granted them by Congress." *Id.*

1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981). AUC has cited to no decisions that conflict with this unanimous rule, such as would justify this Court exercising its discretionary power to review the issue. Similarly, AUC has cited to no intervening law which would cause this Court to reverse its earlier decision. Accordingly, this Court should deny the petition for writ of *certiorari*.

B. The Petitioners in Affiliated Ute Themselves Recognized That This Court Decided the Authorized Representative Issue

As the Tenth Circuit noted: "the AUC [did] not object to the Supreme Court's addressing the [authorized representative] issue; rather, it object[ed] only to the fact that the Supreme Court resolved the issue against it." *Murdock*, 975 F.2d at 690 (Pet., App. 15). This fact is made abundantly clear by a review of AUC's Petition for Rehearing in *Affiliated Ute*.[11]

The petitioners in *Affiliated Ute*, which included AUC, conceded that this Court had determined the authorized representative issue on the merits when they sought a rehearing of that precise issue. AUC began its

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[11] Portions of the Petition for Rehearing are included in this brief as Appendix B. References to the Appendix will be made as "Amicus App. ___".

petition stating: "Petitioners respectfully request rehearing on those aspects of the case dealing with the identity of the 'authorized representative.' " Amicus App. 5. Petitioners then spent several pages disputing the rationale applied by the Court in determining that the UDC had been properly formed. *See, e.g.,* Amicus App. 5-7, 9. Finally, petitioners concluded their request for rehearing by reiterating that: "[d]amages and the 'authorized representative' question, [sic] are those with [sic] which rehearing is requested." Amicus App. 14.

AUC recognized that it had presented the authorized representative issue for the Court's determination and that the Court had, in fact, determined that issue contrary to the wishes of AUC and its privies. Preclusion, or collateral estoppel, applies to issues that are presented and actually determined by the court.[12] AUC presented

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[12]Preclusion generally is appropriate if both the first and second action involve application of the same principles of law to an [sic] historic fact setting that was complete by the time of the first adjudication. 18 Wright & Miller, § 4425.

Clearly, the "historic fact setting" surrounding the formation of UDC as the authorized representative of the mixed-bloods was complete at the time this Court heard and determined *Affiliated Ute.* Petitioners have not alleged any change in the relevant principles of law that would suggest that application of the collateral estoppel doctrine is inappropriate in this case. *See generally* 18 Wright & Miller at § 4425; Restatement (Second) Judgments, § 28. Rather, Petitioners allege that documents, which they purport the government relied upon and misrepresented in *Affiliated Ute, see* Pet. at 16-21, were, until recently, unavailable to AUC. Petitioners apparently claim that these *internal AUC corporate documents, see* Pet., App. 40-47, are newly discovered evidence. *See* Pet. at 16-21. However, "newly

and fully briefed the authorized representative issue, *see Murdock*, 975 F.2d at 690 (Pet., App. 15); this Court determined that issue, and AUC sought a rehearing of that determination, which this Court denied. 407 U.S. 916 (1972); 408 U.S. 931 (1972). For the present Petitioners to now argue that *Affiliated Ute* does not bar relitigation of that same question wholly ignores what actually transpired in this Court some 20 years ago. Simply put, the Tenth Circuit properly determined that AUC and its privies are barred by the doctrine of collateral estoppel from relitigating the authorized representative issue.

The fact that this Court decided the issue contrary to AUC's position *and* declined to reconsider its decision

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discovered evidence normally does not prevent the application of *res judicata*." *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985), *quoting, Dreyfus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 400 U.S. 832 (1970). Moreover, AUC Resolution No. 56-66, Pet., App. 46-47, was readily available to AUC during the *Affiliated Ute* proceedings because the United States identified where it was located in its brief. *See* Pet., App. 39, n.8.

AUC now misconstrues these documents, all of which pertain to actions taken by AUC in 1956. Footnote 8 to the Brief of the United States, Pet., App. 39, does not, as AUC claims in its Petition at 16-17, suggest that AUC created the UDC pursuant to Resolution No. 56-66. Rather, it recognizes that, as part of the Plan for Distribution of the *divisible* tribal assets, which was unanimously approved by the AUC membership, AUC contemplated that it would create a corporation for the management of the *indivisible* tribal assets. As this Court found in *Affiliated Ute*, AUC did not undertake to create that corporation until 1958, when it incorporated the UDC. Therefore, the 1956 documents on which AUC now places so much reliance, do not, in any manner, undercut the analysis made by this Court in *Affiliated Ute*.

does not provide grounds for issuing a writ of *certiorari* to reconsider the identical issue more than 20 years later, when there has been no intervening change in the law. Accordingly, this Court should deny the petition for writ of *certiorari*.

C. The Tribe and the Department of the Interior Have Relied on This Court's Determination in Affiliated Ute in Carrying Out Their Obligations Under the Ute Partition Act to Jointly Manage the Indivisible Tribal Assets

The Tribe has jointly managed the indivisible tribal assets with the UDC since 1959, when the AUC board of directors irrevocably delegated authority to the UDC to jointly manage those assets. *See Affiliated Ute*, 406 U.S. at 136. As Justice Douglas noted in his dissent in *Affiliated Ute*, the Bureau of Indian Affairs (the "BIA") acknowledged UDC as the authorized representative following the AUC delegation and, as a result of that acknowledgement, terminated the federal trust relationship with the individual mixed-bloods in accordance with the terms of the Ute Partition Act. 406 U.S. at 159. The validity of the Tribe's management relationship with UDC and the actions taken by the BIA were confirmed by this Court's decision in *Affiliated Ute*.[13]

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[13] Those mixed-bloods who sold or transferred their UDC stock lost their right to participate in the UDC's management of the indivisible tribal assets or in the distribution of funds derived from those assets. The 85 mixed-bloods who brought the action in *Reyos*, who were jointly represented by the AUC's attorney in the proceedings before this Court in *Affiliated Ute*, had all sold UDC stock, albiet for less than its market value. This

The Tribe has relied on this Court's decision and has jointly managed the indivisible assets with the UDC rather than with the AUC. The United States relied on the decision when it enacted regulations governing the joint management of the indivisible tribal assets which recognized the UDC as the authorized representative of the mixed-bloods. *See* 25 CFR Part 217, added 43 Fed.Reg 40458 (1978). Those regulations provide that:

> In accordance with the Ute Partition Act . . . assets shall be managed jointly by the business committee and the board of directors [of the Ute Distribution Corp.]. These regulations set out the procedures for exercising such joint management.

25 CFR § 217.2.

Court recognized, however, that the mixed-bloods were free to sell their UDC stock and, thereby, discontinue their interest in the management of the indivisible assets. *See generally Affiliated Ute, supra.*

In its Petition, AUC and the individual petitioners claim that "the important and substantial statutory rights of the mixed blood Utes to have a meaningful voice in the management of their interests in the undivided assets of the Ute Indian Tribe, and to preserve these assets from unlawful alienation and dissipation by the UDC without due process of law, will be reduced to a mere footnote in history." Pet. at 21. To the extent that the individual mixed-bloods retain their stock in UDC, they most certainly maintain a meaningful voice in the management of their interests in the indivisible assets. Moreover, to the extent those individuals with UDC stock believe that the UDC has mismanaged their interests, they are free to pursue a stockholders' derivative action against the UDC for mismanagement. This, not the relitigation of whether the UDC was properly formed, is the method by which individual mixed-bloods can protect their interests.

Finally, the lower courts during the past 20 years have, without exception, found that AUC and its privies are precluded from relitigating the authorized representative issue.[14] This Court should not upset what was clearly settled in 1972, by now allowing AUC and its privies to relitigate the identical issue it lost in *Affiliated Ute.*

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of *certiorari.*

Respectfully submitted,

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[14] *See Murdock,* 975 F.2d at 685, n.3 (Pet., App. 4-5, n. 3); note 5 *supra;* and discussion *supra* at 11-12.

APPENDIX A

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 8, 1993

Robert S. Thompson, III
Whiteing & Thompson
1136 Pearl Street, Suite 203
Boulder, Colorado 80302

Re: *Glen Mac Murdock, Jr.* v. *Ute Distribution Corporation, a Utah Corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior,* No. 92-1149

Dear Mr. Thompson:

This is in response to your letter of February 5, 1993.

On behalf of the United States I hereby consent to the filing of a brief as *amicus curiae* on behalf of the Ute Tribe in the above case.

Sincerely,
/s/ William C. Bryson/Illegible
William C. Bryson
Acting Solicitor General

[SEAL] U.S. Department of Justice

KWH
90-2-4-1650

Washington, D.C. 20530

February 8, 1993

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Dear Mr. Chief Justice:

RE: *Glen Mac Murdock, Jr., et al. v. Ute Distribution Corporation, a Utah Corporation; Manuel Lujan, Jr., Secretary of the United States Department of the Interior, No. 92-1149, On Petition for Writ of Certiorari to the Supreme Court of the United States*

Pursuant to Supreme Court Rule 36.1, this letter serves as the respondent, United States' written consent to the Ute Indian Tribe filing a brief *amicus curiae* in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of *certiorari*.

Sincerely,

/s/ Katherine W. Hazard,
Katherine Hazard, Esquire
Attorney, Appellate Section
Environment and Natural Resources Division
Department of Justice
P.O. Box 23795
(L'Enfant Station)
Washington, D.C. 20026

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First N.E.
Washington, D.C. 20543

Re: *Glen Mac Murdock, Jr., et al. v. Ute Distribution Corporation, a Utah Corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior,* No. 92-1149, On Petition for Writ of *Certiorari* to the Supreme Court of the United States

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 36.1, this letter serves as the respondent Ute Distribution Corporation's written consent to the Ute Indian Tribe filing a brief *amicus curiae* in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of *certiorari.*

Sincerely,

/s/ Max. D. Wheeler
Max D. Wheeler, Esq.
Snow, Christensen & Martineau
Counsel of Record
for Respondent
10 Exchange Place,
Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah
84145-5000

APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-v.-

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Petitioner AUC and Reyos jointly petition for rehearing on the decision on the merits dated April 24, 1972, as to questions left open by the opinion and which the Court should either resolve or permit the District Court to examine on remand, and as to apparent inconsistencies in the AUC portion of the case.

I
THE IMPACT OF THE DECISION ON THIS NATION'S OBLIGATIONS TO INDIANS AND THEIR LANDS SHOULD BE RECONSIDERED

Petitioners respectfully request rehearing on those aspects of the case dealing with the identity of the "authorized representative." These portions of the opinion reflect fundamental mistakes of law and fact which, if not corrected, may impair the rights of all Native Americans in matters extending far beyond the issues of this case. This Court, as so often in the past, represents the last hope that these first Americans have to require that this country's commitments to them be honored. Surely such a matter is of sufficient importance to justify rehearing.

We must seek to demonstrate to them that society is responsive to their patient pleas and help them to live among us in prosperity, dignity and honor.

-PRESIDENT RICHARD M. NIXON*

In response to the dilemma posed by the Petition of whether BIA can alter the termination procedures prescribed in acts of Congress, the opinion replies that because "section 6 of the Act, 25 U.S.C. §677e, authorized the mixed-bloods to organize, to adopt a constitution and by laws, and to provide, by that constitution, for the

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* From an address to the National Congress of American Indians, Omaha, Nebraska, 1968, quoted at COMMONWEAL, 4 Sept., 1970, at 432.

selection of authorized representatives," and because the Constitution thus adopted provided that a "quorum" shall consist of twenty-five voters (E. 161), the requirements of Section 6, 25 U.S.C. §677e, of "a majority vote of the adult mixed-blood members at a special election authorized and called by the Secretary" for the valid formation of a common organization were superseded. The opinion thus answers Petitioners protest against high handed bureaucratic action (See Reply Brief for Petitioners, pages 8-11) with the suggestion that is *some* of the Indians (who the Act contemplated were of limited ability at best) concurred, a disregard of the Act's requirements may be sanctioned. If Congress' specification of a "majority" of the 490 persons who were adults may be thus changed to 25, what limits to such arbitrary rewriting of Congressional mandates are then permissible? May BIA, or an officious Indian leader (or in this case, the tribal attorney), substitute the judgment of a single person, or perhaps eliminate any referendum at all?

It is unthinkable – literally – that these unlettered terminated Utes could conceptualize the fine spun reasoning which the opinion has advanced to justify substitution of the clear mandate of the Act. The opinion effectively means that persons who are legally wards of the state may be *estopped* to assert their rights under an act of Congress, which surely introduces a new and dangerous rubric into the law.

I am an Indian and am looked on by the whites as a foolish man; but it must be because I follow the advice of the white man.

-SHUNKA WITKO (FOOL DOG)*

Alternatively, the opinion proposes that because the AUC Constitution in Article V, §1(b) empowered the board of directors to delegate "to corporations organized in accordance with the Act" powers necessary to accomplish their purposes, and because AUC adopted Resolution 59-8 purporting to delegate the powers of Article V, §1, paragraph (b), UDC is therefore the "authorized representative" (Op. 4). This analysis ignores that (1) UDC was not "organized in accordance with the Act" as the opinion assumes. The only corporations authorized by the Act were those "for the grazing of livestock, [and] handling of water and water rights." (See 25 U.S.C. § *677l* (3) and Reply Brief for Petitioners 23-24). The analysis also ignores that (2) the authorized representative power was contained in paragraph (a) of the section rather than paragraph (b) (See Reply Brief for Petitioners 29-30), and was therefore not delegated.

What the opinion does not dispose of, which is relevant to the Court's conclusion, is whether it is fair or reasonable for the terminated Utes to be thus charged with the loss of their heritage. They did not author the disputed resolution or conceptualize the effect this Court has now attached to it. They merely executed documents

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* Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 274 (1970).

presented to them by the tribal attorney, who was also installed as their attorney by BIA. The appearance of that same attorney herein, in opposition to the vital interests of his former clients and in disregard of his solemn covenant with them that he would not do so (See Reply Brief for Petitioners, 14 at note 14), is a circumstance which should bear heavily on whether the terminated Utes may be charged by his acts with the presumption that they intended to abandon Congress' safeguards.

In this connection, Petitioners point in requesting that they be referred to as "terminated Utes" was evidently not well communicated (see Op. 2, at footnote 3). To put the matter more bluntly, the use of such a term by the draftsman of the Act, with its obvious racial overtones, is but symptomatic of the calculated disregard of the terminated Ute's rights in every step of the termination program, including the formation of UDC. The author of that slur was the tribal attorney. Though the Act was adopted by Congress, whose intent must control its doubtful provisions, it was the tribal attorney who was its author. He – not BIA – authored the deviation from the plan Congress sanctioned, when he formed UDC. It was he who purported to serve as legal counsel to *both* sides in the partition of a veritable fortune. *Cf. Luke* 16:13. May such important rights, perhaps, with the entire course of Indian history hanging in the balance, be treated so casually? Should the questionable practices of one mere man not only be given the force of positive law, but be construed in the manner most prejudicial to the interest of the clients he supposedly served? General moral concepts – as well as the ABA Code of Professional Conduct – should preclude such a result.

In holding the terminated Utes strictly accountable for (1) this "resolution adopted with a 42-5 vote," or (2) the adoption of Resolution 59-8 by the vote of 5 Indians, notwithstanding the Act's requirements of a majority vote of adults, the Court has failed to recognize the implication of the Acts promise that the Secretary would approve their "choice of counsel and fixing of fees," 25 U.S.C. §677f. That promise undoubtedly engendered confidence in the terminated Utes that the attorney thus selected for them would *faithfully* apply the safeguards written into the Act.

These matters were given too little attention in the opinion. Particularly in conjunction with the persons of limited abilities being forced to rely on counsel having such a conflict, they present matters warranting inquiry on rehearing.

They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.

-MAPHIUA LUTA (RED CLOUD)*

What the terminated Utes *could* understand was the constantly repeated promise of the Act that the Secretary would see that everything was done properly; by protecting the rights of members "in need of assistance," 25

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* Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 448 (1970).

U.S.C. §677u; by assisting them "in preparing for termination," 25 U.S.C. §677; by proceeding in the manner he deemed in their best interest, 25 U.S.C. §677aa; by providing them with assistance on request and approving their plan for distribution of assets, 25 U.S.C. §677i; by approving trustees and the terms and conditions of trust, 25 U.S.C. §677l(4); and certifying that changes in their status were not detrimental, 25 U.S.C. §677c. These Indians had been nurtured on a system in which the Government supervised their every deed, and such promises led them to believe that it would continue to do so in at least these particulars. The failure of the opinion to recognize and implement these promises, and others which appear in the legislative history, should be reconsidered. If they are not, the entire Indian community may have its confidence shattered. Once more, Indian rights will be unsettled. Once more, serious questions will be raised about whether the Government may be trusted where Indian rights are concerned.

Sapaniese Cuch stated . . . that land was eternal and belonged to a person even though dead, that it was part of their birthright, the same as they passed on their own blood to their children; that the land was theirs, and that . . . they should not be disturbed in what little they had left.

-MINUTES OF A MEETING OF THE WHITE ROCKS COMMUNITY OF UTE INDIANS, March 14, 1945

The Indian's land base is of importance to him far beyond its mere economic value. To the Indian, land is a

way of life, his religion, the stuff of which Indian culture is made. Congress, and President Nixon, have recognized these facts, and made them a part of our national policy, such as in the return of 48,000 acres of valuable forest lands and the sacred Blue Lakes to the Taos Pueblo's in December 1970 with the declaration that "this will mark one of those periods . . . that we started on a new road which led us to justice in the treatment of those who were the first Americans . . . " Washington Post, Dec. 16, 1970 at 27, col. 1.

The implicit assumption of the opinion that these Indians, or any Indians, knowingly and intentionally surrendered control of their lands to a corporation now owned by non-Indians, or that they understood that their stock sales would have that effect, is a conclusion at odds with the President's "new road" policy and one which should be reexamined.

The implications are devastating. The terminated Utes have litigation pending in the Court of Claims seeking compensation for their lost hunting and fishing, timber and water rights. See *Affiliated Ute Citizens v. United States*, No. 156-69 (United States Court of Claims). The Menominee, and perhaps other Indian groups, have similar claims pending. Shall it be *assumed* that they voluntarily surrendered their rights, with no hearing on the merits at all? That could well be the effect of the opinion, and the end of the President's new road of justice.

There may be a temptation for those of us who are the product of a culture which emphasizes personal property values to view the spectre of chaos in Reservation oil

and gas leasing suggested by the tribal attorney (Defendant Interveners Br. 3) as an impediment to recognition of *the aspirations of the terminated Utes* which spring from their own culture. Undesirable consequences for the Reservation land policies if AUC's rights as authorized representative are recognized could occur *only* if one assumes bad faith on the part of AUC. There is no foundation for such an assumption. But what of the consequences for the remainder of this nation's Indian citizens if we do not hazard that risk? Is this nation not big enough to recognize these rights? Shall the cultural values of this small group be sacrificed to massive oil interests?

Even if there could be some basis in the Record for assuming bad faith on the part of the terminated Utes, this Court is not powerless to devise appropriate relief. A *prospective* recognition of AUC's rights, limited as to its retroactive effect, would avoid the fears contrived in the tribal attorney's brief, yet do substantial justice to the Indian petitioners.

-an interest in people, rather than things; a strong sense of community; a need to share our lives with others; a dignity in harsh surroundings; a sympathetic, non-exploitive love for nature; and taking the measure of a man not by what he has, or looks like, or says, but by what he is.

You and I know these things. But too many other Americans do not.

-SENATOR EDWARD M. KENNEDY*

AUC does not propose a mere reargument of that which has now been rejected. What is requested is an inquiry into the unique nature of the Indian personality as it bears upon the issues of this case. Such an inquiry, which was impossible within the scope of legal briefs on the merits, will demonstrate that even if the purport of the disputed resolutions was as the Court has concluded, they should nevertheless not be read quite so literally. That is so because Indian customs do not admit of such a rigid reading, in which importance is attached to particular words such as the opinion attaches to the term "powers . . . necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be organized" (Op. 4). Surely the meaning of these acts in the eyes of the Indian is a fundamentally important inquiry. Such inquiry is possible now that the scope of the issues has been reduced.

The query of Mr. Justice Marshall at oral arguments as to just how long we must continue to protect our Indian brothers was most appropriate. Time was not available to respond adequately. The answer, which we propose to supply on rehearing, lies in the distinct culture of the Indian, with its emphasis on non-exploitive sharing of lives and things.

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* From an address to the National Congress of American Indians, Albuquerque, New Mexico, October 7, 1969.

If a compulsory cultural change is the answer, which is simultaneously the basic assumption and fundamental weakness of termination, such change cannot be wrought in this generation. This generation of Native Americans was nurtured on bureaucratic paternalism. Such persons should not be presumed to have intended more than Congress prescribed. The inquiry which AUC proposes will reveal that they relied, as they had a right to do, on their belief that Congress' devices for their protection would be respected. This Court should require that their natural expectations be honored.

* * *

CONCLUSION

Petitioners do not seek rehearing on all aspects of the opinion. The findings that the government is not liable, and that the terminated Utes are not entitled to a pro-rata distribution of the minerals, are findings with which AUC disagrees, but does not challenge.

Damages, and the "authorized representative" question, are those with which rehearing is requested. The former should be corrected without formal argument, for they represent simple oversights. The latter should be scheduled for briefing and argument concerning the social implications of the opinion – questions which have not been disposed of or briefed in depth to date.

* * *

Supreme Court, U.S.
FILED
MAR 31 1993

No. 92-1149

In the Supreme Court of the United States

OCTOBER TERM, 1992

GLEN MAC MURDOCK, ETC., ET AL., PETITIONERS

v.

UTE DISTRIBUTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), which held that the Ute Distribution Corporation is the authorized representative of mixed-blood Utes for purposes of managing indivisible tribal assets, collaterally estops petitioners from relitigating that issue.

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BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 975 F.2d 683. The opinion of the district court (Pet. App. 17-20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1992. On November 30, 1992, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 7, 1993. The petition for a writ of certiorari

was filed on January 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a nearly 25-year-old dispute over which organization, the Ute Distribution Corporation (UDC) or the Affiliated Ute Citizens of the State of Utah (AUC), is the authorized representative of the "mixed-blood Utes" for purposes of managing certain Ute tribal assets.

1. The Act of August 27, 1954 (Ute Indian Supervision Termination Act), ch. 1009, 68 Stat. 868, 25 U.S.C. 677-677aa, pertained to the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. Section 1 of the Act stated its purpose: "to provide for the partition and distribution of the assets of the * * * Tribe * * * between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U.S.C. 677. Section 6 of the Act authorized the mixed-blood Utes to organize, to adopt a constitution and bylaws, and to provide, by that constitution, for the selection of authorized representatives with power "to take any action that is required by [the Act] to be taken by the mixed-blood members as a group." 25 U.S.C. 677e. Section 10 of the Act stated that after the final membership roll of the mixed-blood and full-blood groups had been published, the Tribal Business Committee, representing the full-bloods, and the authorized representative of the mixed-bloods would

commence division of the assets of the Tribe that were susceptible to equitable and practicable distribution. 25 U.S.C. 677i. A portion of the tribal assets—including gas, oil, and mineral rights, and unadjudicated or unliquidated claims against the United States—were classified as "not susceptible to equitable and practical distribution." 25 U.S.C. 677*o*(a). These "indivisible" assets were to be "managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." 25 U.S.C. 677i.

2. The mixed-blood Utes' "authorized representative" for purposes of the indivisible tribal assets was initially the AUC, an unincorporated association. The AUC delegated its authority to the UDC in 1959. The UDC issued ten shares of stock to each member of the mixed-blood group to represent his or her interest in the indivisible tribal assets. Pet. App. 3-4. A number of mixed-blood Utes subsequently sold their shares at prices later determined to be substantially lower than the stock's actual value. Those transactions gave rise in 1968 to two lawsuits.

In *Reyos* v. *United States*, 85 mixed-blood Utes sued a bank that had acted as transfer agent for the shares of UDC stock, as well as two of the bank's officers. The *Reyos* plaintiffs argued that the bank and its officers had violated securities laws by encouraging mixed-blood Utes to sell their UDC stock at disadvantageous prices. The United States was later added as a defendant when the plaintiffs alleged that the government had breached a trust obligation by failing to oversee the plaintiffs' improvident sales of the UDC stock and to prevent

fraud in connection with those sales. The district court held for the plaintiffs in their suit against the bank and its officers, and also found the United States liable for breaching a duty to the plaintiffs. The court of appeals reversed in part and remanded. It found the bank and its officers liable, but to a lesser extent than the district court had found. The court of appeals held that the United States was not liable, concluding that it owed no duty to the plaintiffs in connection with their sales of stock. *Reyos* v. *United States*, 431 F.2d 1337 (10th Cir. 1970); see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 140-141 (1972).

While the *Reyos* case was pending in the district court, the AUC filed the *Affiliated Ute Citizens* case against the United States. In *Affiliated Ute Citizens*, the AUC sought: (1) pro rata distribution to the individual members of the mixed-bloods' percentage share of the indivisible mineral estate underlying the Reservation; and (2) a declaration that the AUC and not the UDC was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible assets jointly with the Tribal Business Committee. The United States filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The district court granted that motion, and the Tenth Circuit affirmed. *Affiliated Ute Citizens* v. *United States*, 431 F.2d 1349 (1970); see *Affiliated Ute Citizens*, 406 U.S. at 139-140.

On petitions for a writ of certiorari, this Court granted review in both *Reyos* and *Affiliated Ute Citizens* and consolidated the cases for argument and decision. 406 U.S. at 141. The Court affirmed the

Tenth Circuit's ruling in *Affiliated Ute Citizens* that the AUC's action against the United States for outright distribution of the mixed-bloods' percentage of the mineral estate "was properly dismissed for want of jurisdiction." *Id.* at 143. This Court then considered the AUC's contention that it (rather than the UDC) was the mixed-bloods' authorized representative for purposes of managing the mineral interest with the Tribal Business Committee. The Court concluded: "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. In the *Reyos* case, as to the claim against the United States, the Court affirmed the decision of the court of appeals that the United States had no duty to the plaintiffs regarding their sales of the stock. *Id.* at 149-150. The Court also affirmed the court of appeals' holding that the bank and its officers were liable for violation of the securities laws, *id.* at 150-154, although, disagreeing with the court of appeals, it reinstated the district court's award of damages based on a valuation of UDC stock at $1500 per share, *id.* at 154-157.

3. In 1989, petitioners AUC, Glen Mac Murdock, Jr. (a mixed-blood Ute and AUC member), and Mac Eugene Murdock (Glen's son, who is not a mixed-blood Ute and consequently not an AUC member) filed suit against the Tribe, the UDC, and the Secretary of the Interior. They sought various relief, including a declaratory judgment that the AUC, and not the UDC, was the authorized representative of the mixed-blood Utes for purposes of managing the indivisible tribal assets. The UDC and the Secretary

contended that collateral estoppel prevented petitioners from relitigating the authorized-representative issue. Pet. App. 3-4, 13 & n.6. The district court agreed and dismissed the suit. Pet. App. 17-20.

The court of appeals affirmed. Pet. App. 1-16. It first identified and analyzed each of the four elements necessary to establish collateral estoppel: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action was finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or is in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. Pet. App. 8; see Pet. App. 8-16. The court then concluded: "The Supreme Court's decision in *Affiliated Ute Citizens* v. *United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity 'entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.' Thus, the doctrine of collateral estoppel precludes [petitioners] from relitigating that issue." Pet. App. 16 (citation omitted).

ARGUMENT

Petitioners contend (Pet. 11-21) that this Court's decision in *Affiliated Ute Citizens/Reyos* does not collaterally estop them from seeking a declaratory judgment that the AUC is the authorized representative of the mixed-blood Utes for purposes of managing

indivisible tribal assets.[1] The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners first contend (Pet. 11-12) that the issue they raise in this case is not the same issue decided by this Court in *Affiliated Ute Citizens/Reyos*. That contention is without merit.

In the district court, petitioners sought a declaratory judgment that "the plaintiff AUC, and not the UDC, is the authorized representative of the mixed blood Utes for purposes of the 'joint management' of indivisible assets of the Ute Indian Tribe." Pet. App. 9. In the *Affiliated Ute Citizens/Reyos* litigation, the AUC instituted suit against the United States seeking "a determination that AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. This Court decided that issue by concluding that "[c]learly, it is UDC and not AUC that is entitled to

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[1] The petition presents only the issue whether this Court's decision in *Affiliated Ute Citizens/Reyos* bars petitioners from relitigating the authorized-representative issue. See Pet. i. We note, however, that the district court held that a number of other decisions had also resolved that issue and bar petitioners from relitigating it. See Pet. App. 19; see also, *e.g.*, *Maldonado* v. *Hodel*, 977 F.2d 596 (10th Cir. 1992) (Table), aff'g 683 F. Supp. 1322 (D. Utah 1988); *United States* v. *Felter*, 752 F.2d 1505 (10th Cir. 1985). Because it found that this Court's decision in *Affiliated Ute Citizens/Reyos* precludes petitioners from relitigating the issue, the court of appeals did not address the preclusive effect of those other decisions. See Pet. App. 4 n.3.

manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The court of appeals thus correctly concluded that "[t]he issue [petitioners] are attempting to litigate is the same as the one addressed previously by the Supreme Court." Pet. App. 9.

2. Petitioners next contend (Pet. 12-13) that this Court did not finally adjudicate the authorized-representative issue in *Affiliated Ute Citizens/Reyos* because resolution of that issue was unnecessary to the judgment. See *Block* v. *Commissioners*, 99 U.S. 686, 693 (1879). That contention is erroneous for two independent reasons.

a. This Court's decision in *Affiliated Ute Citizens/Reyos* had two distinct components—the portion addressing the *Affiliated Ute Citizens* litigation and the portion addressing the *Reyos* litigation. See 406 U.S. at 141-144, 144-154; Pet. App. 11 ("The Court did not decide *Affiliated Ute* alone, however, but rather considered it along with *Reyos*."). In order to resolve the securities claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for this Court "to determine whether the UDC was the mixed-blood Utes' authorized representative." Pet. App. 11. As the court of appeals explained (Pet. App. 11-12):

> The Supreme Court concluded that the bank and two of its officers had violated the securities laws and that the district court had properly computed damages. In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued and had to determine the fair value of that

> stock. The district court had assessed the value of the UDC stock based on the assets held by the corporation, namely, the mineral rights, the unliquidated and unadjudicated claims against the United States, and all other indivisible tribal assets. Revenue[s] from such assets were determined to be payable to the UDC and ultimately to be disbursed as dividends to the UDC stockholders. The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

The court of appeals thus correctly recognized that resolution of the authorized-representative issue "was a necessary part of the Court's decision in the *Reyos* portion of its opinion." Pet. App. 9-10.

b. Moreover, in deciding the *Affiliated Ute Citizens* aspect of the case, this Court considered two separate issues: (1) the AUC's claim that the United States was required to distribute to the mixed-blood Utes their "percentage of the mineral estate"; and (2) the AUC's request for a declaration that "AUC is entitled to participate in management with the business committee of the full-bloods." 406 U.S. at 141. On the first issue, the Court noted that the district court did not have jurisdiction to entertain a suit in which a plaintiff sought property (or money)

from the United States unless the United States had consented to the suit. *Id.* at 141-143. Finding no such consent, the Court ruled that there was no jurisdiction to entertain that claim. *Id.* at 143.

With respect to "AUC's prayer for a determination as to management rights," 406 U.S. at 143, however, the Court reached the merits and concluded that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144. The Court did not address the jurisdictional basis for deciding that question. Contrary to petitioners' assertions (Pet. 6, 12-13), however, that omission does not mean that the Court implicitly believed it had no jurisdiction to consider the issue, and nevertheless proceeded to address it in dicta. In fact, the more logical explanation is that the Court believed it had jurisdiction to decide "AUC's prayer for a determination"—a declaratory judgment—"as to management rights," 406 U.S. at 143, just as petitioners necessarily contend in this case that the district court has jurisdiction to determine the same issue. See Pet. App. 18. In sum, this Court in the *Affiliated Ute Citizens* portion of the case did decide that "it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods," 406 U.S. at 144, and its decision on that issue was necessary to dispose of the AUC's request for a determination of that very issue.

3. There is no merit to petitioners' assertion (Pet. 13-15) that they are not in privity with the plaintiffs in *Affiliated Ute Citizens/Reyos*. First, the claim of the individual petitioners is derivative of the claim of

the AUC. "To the extent that Glen Mac Murdock would benefit if relief were obtained, he would do so only in a derivative capacity owing to his status as a member of the AUC." Pet. App. 13. That conclusion follows from the fact that "[i]f the courts were to declare the AUC the mixed-blood Utes' authorized representative, the AUC could then provide benefits (in whatever form) from the indivisible tribal assets to its members." *Ibid.*[2]

Second, the AUC was a party to the *Affiliated Ute Citizens* litigation, and thus is bound by that decision. Moreover, even assuming this Court's conclusion that the UDC was the mixed-bloods' authorized representative was unnecessary to the decision in *Affiliated Ute Citizens*, that does not advance petitioners' cause because the AUC is in privity with the plaintiffs in the *Reyos* case. As the court of appeals explained:

> The AUC sponsored the companioned *Reyos* case. All the plaintiffs in the *Reyos* case were members of the AUC. The AUC brought the *Affiliated Ute* case to provide an alternative remedy to the damages it viewed as inadequate in the *Reyos* case. The same attorneys represented the petitioners in both cases before the Supreme

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[2] Petitioner Mac Eugene Murdock, the son of Glen Mac Murdock, is not a member of the AUC. However, to the extent Mac Eugene Murdock would not benefit from a declaratory judgment that the AUC is the legitimate representative of the mixed-blood Utes, he has no standing to raise that issue. To the extent he would benefit from a judgment in favor of petitioners, he is precluded to the same extent as his father. Pet. App. 13 n.6.

> Court and filed a single brief. The AUC cannot now argue that its interests were not adequately represented during the *Reyos* litigation. Where an organization brings litigation in the name of individuals but retains "effective control", "[o]rdinary principles of preclusion by participation and control suggest that the organization should be subject to issue preclusion in later litigation."

Pet. App. 14 (quoting 18 C. Wright & A. Miller, *Federal Practice and Procedure* § 4456, at 492 (1981)). Accordingly, the court below properly concluded that the AUC is in privity with the plaintiffs in the *Reyos* case.

4. Finally, the court of appeals properly rejected petitioners' contention (Pet. 16-21) that they did not have a full and fair opportunity to litigate the authorized-representative issue in *Affiliated Ute Citizens/Reyos*. The AUC raised the authorized-representative issue in its complaint in *Affiliated Ute Citizens*. Pet. App. 15. In this Court, the AUC briefed the issue *and* asked the Court to decide it. *Ibid.* And the Court did decide it. 406 U.S. at 144. Clearly, then, the AUC extensively litigated the authorized-representative issue during the course of the *Affiliated Ute Citizens/Reyos* case. The AUC's real objection at this point is that this Court resolved the issue against the AUC. See Pet. App. 15-16 ("In fact, the AUC does not object to the Supreme Court's addressing the issue; rather, it objects only to the fact that the Supreme Court resolved the issue against it."); see also Ute Indian Tribe Amicus Br. App. B (reproducing rehearing petition filed by the AUC and Reyos in this Court, which argued that the

Court erred in its resolution of the authorized-representative issue but did not argue that the Court did not or should not have resolved the issue).[3] But

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[3] Petitioners submit that this Court's decision on the authorized-representative issue was erroneous because the Court made a factual mistake regarding formation of the UDC. Pet. 16-21. Even assuming petitioners could avoid collateral estoppel, their contention is incorrect on the merits. After the UDC was formed in 1958 to manage mineral rights and unadjudicated claims against the United States jointly with the Tribal Business Committee, the AUC delegated authority to the UDC by Resolution No. 59-8 (Jan. 7, 1959). The delegation from AUC in Resolution No. 59-8 authorized the UDC "to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation." The Court's ruling in *Affiliated Ute Citizens/Reyos* on the delegation of authority from the AUC to the UDC was thus correct. Moreover, contrary to petitioners' intimation (Pet. 16-17), this Court did not state that formation of the UDC was approved by the members at a tribal meeting on July 14, 1956. In any event, even if this Court had believed that formation of the UDC was approved by the members in 1956, that mistake was irrelevant to the Court's analysis. In the section of the opinion rejecting the AUC's claim that it was the authorized representative, the Court never mentioned or cited the meeting of July 14, 1956, or Resolution No. 56-66 (August 13, 1956) (reproduced at Pet. App. 46-47), which arose out of that meeting. See 406 U.S. at 143-144. The Court instead discussed and relied on the facts that the "UDC was formed by mixed-bloods in 1958 specifically to manage mineral rights and unadjudicated claims against the United States jointly with the business committee," and that the "AUC approved UDC's articles and by resolution delegated authority to UDC to act in accord with those articles." *Id.* at 143. Petitioners do not challenge those factual statements by the Court, which were the basis for its ultimate legal conclusion that "[c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and

that, of course, is not a basis for avoiding the doctrine of collateral estoppel. The court of appeals correctly concluded that "the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets." Pet. App. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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mineral rights with the committee of the full-bloods." *Id.* at 144.